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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

MICHIGAN EDUCATION ASSOCIATION-NEA, NATIONAL EDUCATION ASSOCIATION, CENTRAL MICHIGAN UNIVERSITY FACULTY ASSOCIATION, FERRIS FACULTY ASSOCIATION, GROSSE POINTE EDUCATION ASSOCIATION, GROSSE POINTE ASSOCIATION OF EDUCATIONAL OFFICE PERSONNEL, LANSING SCHOOLS EDUCATION ASSOCIATION, MENDON EDUCATION ASSOCIATION, TRAVERSE CITY EDUCATION ASSOCIATION,

Petitioners,

v.

ROBERT G. BROMLEY, PHILIP R. KINTZELE, KARL R. LINDFORS, FREDERICK M. PHELPS, III, KEN W. SMITH, JOHN B. MITCHELL, J. CARROLL ARNETT, ELLA M. GREGORICKA, THOMAS B. REED, THOMAS E. FAHLSTROM, TERRY L. APPS, SANDRA L. CONROY, CHARLENE L. MERRILL, VICKY L. NIEWOONDER, SALLY J. REDINGER, GORDON E. THOMAS, JAMES W. TROWBRIDGE, SHIRLEY A. TWIETMEYER,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When a union adopts a service (*i.e.*, agency) fee notice and collection system that complies with the procedural requirements set forth in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), including the requirement that objecting feepayers be afforded an opportunity to challenge the amount of the service fee that the union proposes to collect before an impartial arbitrator, does the First Amendment require that an objecting feepayer be afforded the right to a federal court review, on an entirely new factual record, of the arbitrator's findings as to the accuracy of the union's calculations of the amount of money that it expended for particular chargeable activities?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
STATEMENT OF JURISDICTION	2
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT OF THE CASE	2
A. Statement of Facts	2
B. Proceedings Below	7
REASONS FOR GRANTING THE WRIT	9
CONCLUSION	19

TABLE OF AUTHORITIES

CASES — Page

Abood v. Detroit Board of Education, 431 U.S. 209 (1977) ..... *passim*
Andrews v. Education Ass'n, 829 F.2d 335 (2d Cir. 1987) 12, 17
Beckett v. Air Line Pilots Ass'n, 995 F.2d 280 (D.C. Cir. 1993) 13
Chicago Teachers Union v. Hudson, 475 U.S. 292 (1986) ..... *passim*
Crawford v. Air Line Pilots Ass'n Int'l, 992 F.2d 1295 (4th Cir.), *cert. denied*, 510 U.S. 869 (1993) 17
Damiano v. Matish, 830 F.2d 1363 (6th Cir. 1987) .. 12
Dashiell v. Montgomery County, 925 F.2d 750 (4th Cir. 1991) 17
Ellis v. Railway Clerks, 466 U.S. 435 (1984) 9, 14
Gilpin v. AFSCME, 875 F.2d 1310 (7th Cir.), *cert. denied*, 493 U.S. 917 (1989) 17
Gwirtz v. Ohio Education Ass'n, 887 F.2d 678 (6th Cir. 1989), *cert. denied*, 494 U.S. 1080 (1990) 17
Hohe v. Casey, 956 F.2d 399 (3d Cir. 1992) 13, 14, 15
Hudson v. Chicago Teachers Union, 922 F.2d 1306 (7th Cir. 1991), *cert. denied*, 501 U.S. 1230 (1991) 13-14, 18
Jibson v. Michigan Education Ass'n, 30 F.3d 723 (6th Cir. 1994) 17
Lancaster v. Air Line Pilots Ass'n Int'l, 76 F.3d 1509 (10th Cir. 1996) 13, 14, 15
Laramie v. County of Santa Clara, 784 F. Supp. 1492 (N.D. Cal. 1992) 17
Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507 (1991) 3, 9, 14
NLRB v. Gissel Packing Co., 395 U.S. 575 (1969) .. 16
Pilots Against Illegal Dues v. Air Line Pilots Ass'n, 938 F.2d 1123 (10th Cir. 1991) 17
Ping v. NEA, 870 F.2d 1369 (7th Cir. 1989) 12
Reese v. City of Columbus, 71 F.3d 619 (6th Cir. 1995), *petition for cert. filed*, 65 U.S.L.W. 3110 (U.S. Aug. 2, 1996) (No. 96-186) 17

TABLE OF AUTHORITIES—Continued

	Page
Tierney v. City of Toledo, 917 F.2d 927 (6th Cir. 1990)	13, 17
Weaver v. University of Cincinnati, 970 F.2d 1523 (6th Cir. 1992), *cert. denied*, 507 U.S. 917 (1993)	17
STATUTES	
28 U.S.C. § 1254(1)	2
42 U.S.C. § 1983	7, 12
OTHER AUTHORITIES	
Monaghan, *First Amendment "Due Process,"* 83 Harv. L. Rev. 518 (1970)	16

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Michigan Education Association-NEA, *et al.*, respectfully petition this Court to issue a writ of cer-

tiorari to review the decision of the United States Court of Appeals for the Sixth Circuit in *Bromley v. Michigan Education Association-NEA* (6th Cir. Nos. 94-1164, 94-1210).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is officially reported at 82 F.3d 686, and is reprinted in the separately-bound Appendix to the Petition ("App.") at 1a. The opinion of the United States District Court for the Eastern District of Michigan is reported at 843 F. Supp. 1147, and is reprinted at App. 21a. The arbitration award which formed the predicate for the district court's decision is not officially reported, and is reprinted at App. 40a.

STATEMENT OF JURISDICTION

The decision of the Court of Appeals was issued on April 26, 1996. A timely petition for rehearing and suggestion for rehearing en banc was denied by the Court of Appeals on June 17, 1996. App. 67a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides in pertinent part as follows:

> Congress shall make no law . . . abriding the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

A. Statement of Facts

This lawsuit was commenced by plaintiffs-respondents Robert Bromley, *et al.* ("plaintiffs"), who at all times relevant herein were employees of public school districts

in Michigan or of Central Michigan University, a public institution of higher education. During the 1991-92 school year—the year at issue here [1]—each of the plaintiffs was represented, and received the benefits of collective bargaining, by an association affiliated with petitioners Michigan Education Association-NEA ("MEA") at the state level, and petitioner National Education Association ("NEA") at the national level. Each of the plaintiffs chose not to join the local association that represented him or her.

Pursuant to state law, the collective bargaining agreements that were negotiated by the relevant local associations for the 1991-92 school year required non-members to pay agency fees (denominated under state law and in this Petition as "service fees") to the local associations, a portion of which in turn was allotted to MEA and NEA. (The local associations, MEA, and NEA are collectively referred to herein as the "unions.")

To implement the service fee provisions in the collective bargaining agreements, the unions established a procedure designed to comply with all applicable requirements of the First Amendment as set forth in this Court's decisions from *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), through *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), to *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991). That procedure begins with an elaborate accounting and record-keeping system designed to enable each of the unions to distinguish between expenditures for activities which are "germane to the union's duties as exclusive bargaining representative," *Lehnert*, 500 U.S. at 528—to which nonmembers constitutionally may be compelled to contribute—and expenditures for "ideological causes not germane to its duties as collective-bargaining representative," *Abood*, 431 U.S. at 235—to which nonmembers constitutionally cannot be compelled to contribute over their objection. Through

[1] Unless otherwise indicated, financial and other statistics cited in this Petition are for the 1991-92 school year.

this system, the unions are able to account for the activities of each of their employees and officers on a daily basis, and to attribute every other expenditure to particular programs or activities.[2]

At the conclusion of the school year, each of the unions—after reviewing all of the activity reports, vouchers, and other expenditures for the year, and after analyzing on an inch-by-inch basis each publication produced during the year—calculates, for each program or budgetary line item, the proportion of its money that was expended for "germane" and "non-germane" activities. Once the unions' calculations are completed, they are audited by the unions' independent auditors in accordance with standard auditing procedures. The unions then establish a reduced service fee for the current school year by discounting union dues for that year by the percentage of non-germane expenditures for the prior school year.[3]

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[2] For NEA, which has an annual budget in excess of $130 million, this requires weekly activity reports from approximately 550 employees, and a coding and record-keeping system to handle some 45,000 financial transactions. For MEA, which expends over $30 million per year, the record-keeping system involves 130 employees and over 20,000 financial transactions.

The over 1,000 local associations affiliated with MEA and NEA are much smaller, and only seven of those associations chose (or were able) to incur the record-keeping and auditing costs required to separate germane from non-germane expenditures. The rest of the local associations waived their right to require nonmembers to pay their fair share of the costs of collective-bargaining related activities. The seven local associations which did choose to establish a system for charging nonmembers for germane activities were all named as defendants in this lawsuit and are petitioners herein even though none of the individual plaintiffs belong to six of those associations. For purposes of this Petition, we focus on the conduct of petitioners MEA, NEA and the one local association—the Central Michigan University Faculty Association (with an annual budget of roughly $17,000)—that actually represented any of the plaintiffs.

[3] The local associations use the categorization system developed by MEA; their year-end calculations are made for them by MEA and audited by MEA's auditors.

After the audit is complete, the unions send a notice to each non-member informing the non-member of his/her obligation to pay a service fee, and also of his/her right to refuse to support activities not germane to the local association's role as exclusive representative. The notice includes a "Service Fee Election Form," which affords the nonmember three options: to pay a service fee equal to union dues; to pay the reduced service fee as calculated by the unions; or to pay the reduced service fee into an interest-bearing escrow account and to challenge the unions' calculation of the amount of the reduction. The nonmember is allowed to make the choice separately with respect to the local association, MEA, and NEA. To assist the non-member in making the choice, the non-member is given a copy of the audited schedule of germane and non-germane expenditures for the applicable local association, MEA and NEA, along with the letters from the auditors confirming the accuracy of these schedules and the summary guidelines used to distinguish germane from non-germane expenditures.

In 1991, throughout the state of Michigan, 236 employees represented by one of the more than 1,000 MEA affiliates—including the eighteen plaintiffs—challenged the amount of the reduced service fee. Under the unions' procedure, all of the money paid by these individuals was put into an interest-bearing escrow account, and their challenges automatically triggered an arbitration procedure. The arbitration was conducted under the auspices of the American Arbitration Association ("AAA") pursuant to its Rules for Impartial Determination of Union Fees ("AAA Rules"), which had been developed in response to *Hudson*.

Under the AAA Rules, an arbitrator is appointed by the AAA from a "special panel of arbitrators" established to adjudicate cases of this type. The arbitrator is charged with the responsibility of assuring that the parties—*i.e.*, the unions and the challengers—have "a fair opportunity

to contest the issues" and a "full opportunity for the presentation of relevant proofs." At the hearing, any party may be represented by counsel; may cross-examine witnesses; and may cause a stenographic record to be made (in which case that record must be made available to the other parties and the arbitrator). In addition, the arbitrator is specifically authorized to direct the parties to "produce such additional evidence as the arbitrator may deem necessary to an understanding and determination of the dispute."

Within thirty days after the closing of the record, the arbitrator is to issue a written award that is "in accordance with applicable law." Under the AAA Rules, "the burden is upon the union to justify whatever fees are being disputed."

In the instant situation, the arbitrator appointed by the AAA conducted a three-day hearing, at which the MEA and NEA officials responsible for implementing the service fee procedure testified at length concerning the methodology, judgments, and computations that had been used to arrive at the reduced fee for the 1991-92 school year. Through these witnesses, extensive documentary evidence was introduced into the record as well, including the full set of written guidelines used to distinguish between germane and non-germane activities, and spread sheets, work sheets, and memoranda used in making the necessary calculations.

Although all eighteen of the plaintiffs in this lawsuit challenged the unions' reduced service fee, the plaintiffs were advised by their counsel that participating in the arbitration proceeding was "unlikely to provide as much relief as legal action in court." Accordingly, only one plaintiff, Thomas Reed, attended the arbitration hearing, and his participation was limited: he attended only the first day of the hearing and questioned only the first two witnesses.

On April 16, 1992, the arbitrator issued a thirty-page Opinion and Award. After canvassing the legal background, the arbitrator concluded that "[t]he unions in this proceeding convinced the arbitrator that they had properly excluded all expenditures for political and ideological activities," and that "each chargeable category of expenses consisted of either a direct collective bargaining activity or an activity which is germane to the duties of an exclusive representative."

B. Proceedings Below

On October 6, 1992, plaintiffs commenced this lawsuit pursuant to 42 U.S.C. § 1983, alleging that they were being required to support "union activities which cannot constitutionally be financed from the compulsory fees of objectors." The complaint identified five specific categories of activities which, plaintiffs contended, improperly had been treated by the unions as germane to collective bargaining.

After filing their complaint, plaintiffs submitted a request for production of documents which called upon the unions to produce the entire arbitral record and each and every document "underlying, used in, created during, or otherwise related to Defendants' calculations, and their auditors' examinations, of Defendants' schedules of chargeable and nonchargeable expenditures." The unions produced only the arbitral transcript and exhibits plus the Election Forms filed by the 236 objectors, and then moved for summary judgment on the basis of that record and sought a protective order against further discovery. Plaintiffs opposed the summary judgment motion on two grounds:

1. Plaintiffs argued first that the motion was premature because they were entitled to discovery of the unions' books and records "in order to gauge the propriety of the Unions' calculations," and "reach an informed conclusion whether to accept or op-

pose [the unions'] determination of its chargeable and nonchargeable expenditures." J.A. 184, 182, 183.

2. On the merits, plaintiffs argued that certain categories of activities which the unions and the arbitrator had deemed to be germane to collective bargaining—and hence chargeable to objecting nonmembers—were not chargeable as a matter of law.

On January 11, 1994, the district court granted summary judgment for the unions. The district court ruled that, as a matter of substantive constitutional law, "the issue to be determined in this suit is not, per se, the correct amount of the fee to be charged to the plaintiffs," but rather "the constitutionality of the unions' definitions of categories of chargeable activities and expenditures," and "whether the computations were made in a [constitutionally] reasonable manner." App. 32a. The district court explained:

> Diligent review by courts of the categories of activities deemed chargeable by unions is the most important step that courts may take to protect First Amendment values.
>
> If auditors and arbitrators perform their roles in an adequate manner, the risks of burdening free speech is further diminished. The AAA's Rules for Impartial Determination of Union Fees are carefully crafted to accomplish this objective. [App. 31a]

The district court then proceeded to consider, and reject on the merits, plaintiffs' challenge (1) to the germaneness of various categories of activities for which they had been charged, App. 33a-37a, and (2) to certain aspects of the cost allocation system used by the NEA, App. 37a-38a. On that basis the court granted summary judgment for the unions.

Plaintiffs appealed to the United States Court of Appeals for the Sixth Circuit, which reversed the district

court's decision. The Court of Appeals ruled that the "right to have an Article III court adjudicate suits brought pursuant to § 1983 for vindication of rights secured by the First Amendment" encompasses the right to put at issue the unions' "cost allocations" and to "probe the[ir] factual underpinnings." App. 10a-11a, 12a, 17a. In the appellate court's view, it "would not be realistic . . . to expect the arbitrator to go through raw data at the hearing as thoroughly as litigants commonly go through such data in pre-hearing discovery." Accordingly, the court of appeals held that plaintiffs were entitled to discovery "of the materials on which the calculations were based." App. 12a. The court below rejected the unions' contention that this holding would render "the procedure spawned by the Supreme Court [in *Hudson*] largely a waste of time and money"; in the court's view, the only point—and justification—for the *Hudson* procedures is to "offer[] a potential for avoiding litigation." App. 13a-14a.[4]

REASONS FOR GRANTING THE WRIT

This Court's leading agency fee decisions establish both substantive standards and procedural requirements for the collection of union fees from objecting nonmembers. The substantive standards, initially set forth in *Abood*, have been developed and refined in *Ellis v. Railway Clerks*, 466 U.S. 435 (1984), and *Lehnert*, *supra*, and there is a good measure of order on these issues in the lower courts. Precisely the opposite is true, however, with respect to the procedural requirements announced in *Hudson*. In the ten years since that decision was handed down, this Court has not spoken to the issue, and, as this lawsuit indicates, there is a need for further guidance.

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[4] On the substantive issues raised by plaintiffs, the Sixth Circuit agreed with the district court on most points, but held that expenditures "designed solely to allow the union[s] to perpetuate [themselves] by maintaining the loyalties of existing members . . . should be treated as non-chargeable." App. 18a-19a. Petitioners do not seek review by this Court of that holding.

There are three reasons why this Court should issue a writ of certiorari to review the lower court's holding.

First, the courts of appeals have developed two conflicting views as to the purpose and effect of the *Hudson* requirement that a service fee system must include a process for review of the fee calculations by an "impartial decisionmaker." One camp, led by the Seventh Circuit, considers the *Hudson* hearing requirement as an integral part of an overall system that vindicates First Amendment concerns without turning every factual question about the computation of a fee into an issue to be decided by a federal court *de novo* on an entirely new factual record. The other camp, led by the Sixth Circuit, reads *Hudson* as merely requiring unions to give objecting fee payers an alternative forum to use if they so choose, the only value of which is that it may dissuade objectors from proceeding in federal court. This disagreement in principle is most clearly manifest in those cases that consider whether would-be plaintiffs are required to present in a *Hudson* arbitration the issues they wish to litigate in federal court. That question, and the question presented here as to the role of the federal courts in adjudicating service fee claims after a *Hudson* arbitration, are plainly linked and the decision below rests on premises that have been rejected by the Seventh and Tenth Circuits in their decisions on the exhaustion issue. Part A.

Second, the decision below threatens to defeat the very point of *Hudson*. The *Hudson* procedures were expressly designed to "achieve th[e] objective" of "preventing compulsory subsidization of ideological activity by employees who object thereto"—and thus vindicating the objectors' constitutional rights—"without restricting the Union's ability to require every employee to contribute to the cost of collecive-bargaining activities." 475 U.S. at 302. That objective would be thwarted if the federal courts were drawn into superintending all of the computations entailed

in calculating a service fee. And that is especially true where, as here, the objectors bypass a *Hudson* arbitration and seek to use federal court processes to decide what factual determinations to challenge and then to litigate those issues *de novo*.

Third, the Sixth Circuit's decision here inevitably will embroil the district courts in that circuit in litigation that will, as Judge Ripple has warned, "place on overwhelming and unrealistic burden on the courts." Part C.

A. In *Hudson*, this Court held that because requiring service fee payments from employees who are represented by a union but who have chosen not to join the union implicates the First Amendment rights of these nonmembers, "[p]rocedural safeguards are necessary" in order to "minimize the infringement" on these First Amendment rights and to afford the "nonunion employee . . . whose First Amendment rights are being affected . . . a fair opportunity to identify the impact of the governmental action on his interests and to assert a meritorious First Amendment claim." 475 U.S. at 302-03. To achieve these ends, this Court announced two basic procedural requirements: first, "potential objectors [must] be given sufficient information to gauge the propriety of the union's fee," *id.* at 306; and second, actual objectors must be afforded the right to have their "objections addressed in an expeditious, fair, and objective manner," *id.* at 307.

With respect to the second requirement, the *Hudson* Court expressly "reject[ed] the Union's suggestion that the availability of ordinary judicial remedies is sufficient," *id.* at 307 n.20, but also rejected the proposition that "a full-dress administrative hearing . . . is part of the 'constitutional minimum,'" *id.* at 308 n.21. Instead, the Court suggested that "an expeditious arbitration might satisfy the requirement of a reasonably prompt decision by an impartial decisionmaker." *Id.* The Court faulted the arbitration procedure the union had adopted in *Hudson*, however, because the arbitrator in that case was

selected solely by the union and hence was not impartial. *Id.* at 308 & n.21.[5]

Because the procedure at issue in *Hudson* did not provide for an impartial decisionmaker, this Court had no occasion in that decision to expand on the role the federal courts should play where a constitutionally adequate procedure is in place.[6] In attempting to fill this vacuum, the courts of appeals have fallen into basic disagreements.

(1) To start with the most basic, the appellate courts are in square conflict over whether, as Justice White and Chief Justice Burger concluded in their concurring opinion in *Hudson*, *see supra* note 6, objecting fee payers are required to exhaust a proper *Hudson* procedure, where it exists, before challenging a service fee in federal court.

On remand in *Hudson*, the Seventh Circuit answered that question in the affirmative, and refused to pass on the objectors' challenge to the reduced service fee once a proper notice and hearing procedure was put in place. Writing for the court, Judge Ripple reasoned:

> Were we to accept plaintiffs' invitation and provide a hearing and judicial determination of the correctness of the fee, we would in effect render redundant and

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[5] In the wake of *Hudson*, unions generally have sought to establish the kind of arbitration procedure that this Court suggested would suffice by invoking the AAA Rules. The courts of appeals have concluded that the AAA process satisfies the hearing requirement of *Hudson*. *E.g.*, *Damiano v. Matish*, 830 F.2d 1363, 1371-72 (6th Cir. 1987); *Andrews v. Education Ass'n*, 829 F.2d 335, 340-41 (2d Cir. 1987); *Ping v. NEA*, 870 F.2d 1369, 1372-74 (7th Cir. 1989).

[6] In a footnote, *Hudson* states, without further explication, that "[t]he arbitrator's decision would not receive preclusive effect in any subsequent § 1983 action." 475 U.S. at 308 n.21. And, in a concurring opinion, Justice White and Chief Justice Burger expressed their view that "if the union provides for arbitration and complies with the other requirements specified in our opinion, it should be entitled to insist that the arbitration procedure be exhausted before resorting to the courts." *Id.* at 311.

> irrelevant the requirements that an impartial decision-maker hear the dispute and that an escrow account be provided for the amounts reasonably in dispute while the challenge is pending. . . . The federal court does not, at this stage, review the fee calculation. . . . [*Hudson v. Chicago Teachers Union*, 922 F.2d 1306, 1314 (7th Cir.), *cert. denied*, 501 U.S. 1230 (1991) (emphasis in original)]

The Tenth Circuit recently has "conclude[d that] the Seventh Circuit's holding in *Hudson* was correct," and has "adopt[ed] it as the law of this Circuit." *Lancaster v. Air Line Pilots Ass'n Int'l*, 76 F.3d 1509, 1522 (10th Cir. 1996).

The Sixth Circuit has reached precisely the opposite conclusion, and this conclusion formed a predicate for the decision below. In *Tierney v. City of Toledo*, 917 F.2d 927, 940 (6th Cir. 1990), that court held that an exhaustion requirement in a service fee procedure "unduly implies a limitation upon the [objectors'] constitutional rights," and therefore "must be deleted from the plan." In the instant lawsuit, the court of appeals reaffirmed *Tierney*, which the court read as "squarely reject[ing] the proposition that it is constitutional for [a service fee] agreement to require objecting employees to exhaust their arbitration remedies before going into court on their constitutional claims." App. 15a-16a.[7]

(a) This conflict over the exhaustion issues reflects a larger disagreement among the circuits—one which goes to the very heart of the issues in the instant lawsuit—about the purpose of the *Hudson* arbitration requirement and about the respective roles of the arbitrator and the court.

Underlying the Seventh Circuit's exhaustion rule is that court's understanding, expressed by Judge Ripple in *Hud-*

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[7] *See also Beckett v. Air Line Pilots Ass'n*, 995 F.2d 280, 285 (D.C. Cir. 1993) (noting, but declining to resolve, the circuit conflict); *Hohe v. Casey*, 956 F.2d 399 (3d Cir. 1992), discussed below.

son, that "[r]equiring the federal courts to micromanage the fee calculation in every case challenging a union's [service] fee would place an overwhelming and unrealistic burden on the courts." 922 F.2d at 1314. The Tenth Circuit in *Lancaster* likewise stated that, absent exhaustion, it would "be forced to micromanage the fee calculation in every case challenging a union assessment." 76 F.3d at 1522.

Hudson and *Lancaster* thus teach that not every factual issue that can be raised in a *Hudson* arbitration regarding the calculations that go into the reduced service fee is necessarily of constitutional magnitude, and these cases indicate the need for a line between the role of the arbitrator and the court so that the courts are *not* called upon to "micromanage" the computation process. The Third Circuit's decision in *Hohe v. Casey, supra*—which stakes out an intermediate position on the exhaustion question—establishes just such a line.

In *Hohe*, Judge Seitz distinguished between "challenges 'to the propriety of the . . . fee' . . . [which] are, simply stated, challenges to the *chargeability* of an activity," and "challenges to the *amount* of a chargeable fee." *Hohe*, 956 F.2d at 408 & n.4 (emphasis added). According to *Hohe*, challenges of the former type—which raise issues like those raised in *Ellis* and *Lehnert* as to whether objecting nonmembers may be compelled to support particular categories of activities—are for the courts and need not be raised first in arbitration; challenges of the latter type—which involve the unions' calculations as to the amount expended for particular categories of activities—should be decided (at least in the first instance) by the arbitrator.

The line drawn in *Hohe* for purposes of exhaustion is precisely the one which the district court drew—and which the court of appeals rejected—in the instant lawsuit for purposes of defining the constitutional issue posed and hence the scope of federal court review. The district

court here recognized its responsibility to "[d]illigent[ly] review . . . the *categories of activities deemed chargeable by [the] unions*" as well as the procedures used by the union, but refused to be drawn into deciding whether the unions' calculations were correct down to the final penny. *Supra* p. 8. The court of appeals took precisely the opposite view. Reasoning that it "would not be realistic . . . to expect the arbitrator to go through raw data" concerning the unions' calculation of the amount of the service fee, the court below concluded it was appropriate in the federal court litigation to "probe the factual underpinnings" of "the unions' cost allocations." *Supra* p. 9. Accordingly, the court of appeals permitted the discovery at issue here.

The tension between the decision below and *Hudson*, *Lancaster*, and *Hohe* is thus clear.

B. In opening up the federal courts to disputes as to the calculation of service fee reductions, the decision below breaks faith with the rationale of *Abood* and *Hudson*. This is true in two separate respects.

(1) The constitutional right recognized in *Abood* is the "right to withhold . . . support of ideological causes to which [an individual nonmember] objects." 431 U.S. at 241. The constitutional "objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricing the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." *Id.* at 237, *quoted in Hudson*, 475 U.S. at 302.

It was expressly to "achieve this objective," 475 U.S. at 302, that this Court in *Hudson* imposed various procedural requirements on unions, including the requirement for review by an "impartial decisionmaker." And lession is clear: so long as a union draws the constitutionally correct line between chargeable and nonchargeable expenditures, and applies that line through constitutionally

required procedures, the First Amendment right "to withhold support of ideological causes" is fully protected. It follows that the judicial role is to police the line that the union draws and the processes it follows, but not to exercise superintendence over every mathematical exercise entailed in calculating the service fee.[8]

(2) Even if alleged constitutional errors in calculating a service fee were to raise issues of constitutional moment, at least this must is clear: allowing the discovery plaintiffs here seek as a preclude to litigating *de novo*, on an entirely new factual record, the unions' calculations of the reduced service fee would defeat the purpose of *Hudson*. By plaintiffs' own admission (in an affidavit they submitted in opposition to the unions' motion for summary judgment), plaintiffs' discovery request—for every document "underlying, used in, created during, or otherwise related to [the unions'] calculations"—was designed to enable plaintiffs to "gauge the propriety of the Unions' calculations," and "reach an informed conclusion whether to accept or oppose [the union's] determination of its chargeable and nonchargeable expenditures." *Supra* pp. 7-8.

But, if plaintiffs wanted to "reach an informed conclusion whether to accept or oppose the [union's] determination," the forum to do so was the *Hudson* arbitration. For as this Court explained in *Hudson*, the precise purpose of the procedural requirements is to enable potential objectors to "identify the impact of the governmental action on [their] interests." 475 U.S. at 303. By allowing plaintiffs to sit out that procedure, and then invoke

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[8] *Cf.* Monaghan, *First Amendment "Due Process,"* 83 Harv. L. Rev. 518, 526 (1970) ("So far as the first amendment is concerned, the task of historical factfinding may be left to administrative agencies, at least if . . . the agencies' procedures appear reasonably capable of ensuring reliable findings"); *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

the federal court's processes to "gauge the propriety of the Union's calculations" and to relitigate factual issues that were the subject of the arbitration hearing, the court below has drained the logic out of *Hudson*'s suggestion that "an expeditious arbitration might satisfy the requirement of a reasonably prompt decision by an impartial decisionmaker." 475 U.S. at 308 n.21.

C. The practical consequences of the Sixth Circuit's decision are large.

As the instant lawsuit illustrates, although most nonmembers are content to pay a service fee that is either equal to the full amount of union dues or a reduced fee calculated by the union, nonetheless the law of large numbers assures that there is a ready pool of would-be plaintiffs to challenge service fees (for whom the Right to Work Foundation provides legal representation at no cost, and without regard to the small financial stakes involved). As a result, service fee litigation has become a staple of the federal courts' diet.

To date, the litigation has focused largely on the category of activities for which objectors may be charged and on the adequacy of the union's notice and procedures.[9]

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[9] For cases on the chargeability of various categories of expenditures, *see, e.g., Reese v. City of Columbus*, 71 F.3d 619 (6th Cir. 1995), *petition for cert. filed*, 65 U.S.L.W. 3110 (U.S. Aug. 2, 1996 (No. 96-186); *Jibson v. Michigan Educ. Ass'n*, 30 F.3d 723 (6th Cir. 1994); *Crawford v. Air Line Pilots Ass'n Int'l*, 992 F.2d 1295 (4th Cir.) (en banc), *cert. denied*, 510 U.S. 869 (1993); *Pilots Against Illegal Dues v. Air Line Pilots Ass'n*, 938 F.2d 1123 (10th Cir. 1991); *Laramie v. County of Santa Clara*, 784 F. Supp. 1492 (N.D. Cal. 1992). For cases challenging the procedures, *see, e.g., Jibson v. Michigan Educ. Ass'n, supra*; *Weaver v. University of Cincinnati*, 970 F.2d 1523 (6th Cir. 1992), *cert. denied*, 507 U.S. 917 (1993); *Dashiell v. Montgomery County*, 925 F.2d 750 (4th Cir. 1991); *Tierney v. City of Toledo, supra*; *Gwirtz v. Ohio Educ. Ass'n*, 887 F.2d 678 (6th Cir. 1989), *cert. denied*, 494 U.S. 1080 (1990); *Ping v. NEA, supra*; *Gilpin v. AFSCME*, 875 F.2d 1310 (7th Cir.), *cert. denied*, 493 U.S. 917 (1989);

When filed five years ago, the instant lawsuit was conceded by plaintiffs' counsel to be "the first" to challenge "computation of the amount of fees." App. 29a & n.7. The decision below opens the door to a new generation of litigation far more costly and complex than anything that has preceded it. The instant lawsuit is illustrative.

MEA and NEA alone expend approximately $170 million annually—in over 60,000 financial transactions a year. Under the position taken by the Sixth Circuit, each of those 170 million dollars, and each of those 60,000 financial transactions, represents a potential object of discovery and dispute in the federal courts. Alleged errors made in measuring inches on a publication page, in dividing salaries by hours worked, in adding numbers are all fair game for federal court review. Issues tried before the arbitrator can be retried, *de novo*, in court. And this is true not just for the MEA and NEA, and not just for the 1991-92 school year, but for each of the thousands of bargaining units in which service fee calculations are made each and every year.

Judge Ripple's warning could not be more apt: opening the doors of the federal courts to these lawsuits "would place an overwhelming and unrealistic burden on the courts." *Supra* p. 13.

Damiano v. Matish, supra; *Andrews v. Education Ass'n, supra*; *Hudson v. Chicago Teachers, supra*; *Hohe v. Casey, supra*.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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(2) FILED

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

MICHIGAN EDUCATION ASSOCIATION-NEA, NATIONAL EDUCATION ASSOCIATION, CENTRAL MICHIGAN UNIVERSITY FACULTY ASSOCIATION, FERRIS FACULTY ASSOCIATION, GROSSE POINTE EDUCATION ASSOCIATION, GROSSE POINTE ASSOCIATION OF EDUCATIONAL OFFICE PERSONNEL, LANSING SCHOOLS EDUCATION ASSOCIATION, MENDON EDUCATION ASSOCIATION, TRAVERSE CITY EDUCATION ASSOCIATION,

Petitioners,

v.

ROBERT G. BROMLEY, PHILIP R. KINTZELE, KARL R. LINDFORS, FREDERICK M. PHELPS, III, KEN W. SMITH, JOHN B. MITCHELL, J. CARROLL ARNETT, ELLA M. GREGORICKA, THOMAS B. REED, THOMAS E. FAHLSTROM, TERRY L. APPS, SANDRA L. CONROY, CHARLENE L. MERRILL, VICKY L. NIEWOONDER, SALLY J. REDINGER, GORDON E. THOMAS, JAMES W. TROWBRIDGE, SHIRLEY A. TWIETMEYER,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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69 pp

TABLE OF CONTENTS

		Page
A.	Opinion of the United States Court of Appeals for the Sixth Circuit	1a
B.	Opinion of the United States District Court for the Eastern District of Michigan	21a
C.	Opinion of the American Arbitration Association Voluntary Labor Arbitration Tribunal	40a
D.	Order of the Court of Appeals on the Petition for Rehearing and Suggestion for Rehearing En Banc	67a

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 94-1164/1210

ROBERT G. BROMLEY, *et al.*,
Plaintiffs-Appellants,

v.

MICHIGAN EDUCATION ASSOCIATION-NEA, *et al.*,
Defendants-Appellees.

On appeal from the United States District Court
for the Eastern District of Michigan

Decided and Filed April 26, 1996

Before: NELSON and DAUGHTREY, Circuit Judges, and HILLMAN, District Judge.*

DAVID A. NELSON, Circuit Judge. The plaintiffs in this lawsuit are public employees whose wages, hours, and other conditions of employment are established through collective bargaining between the bodies by which they are employed and local unions affiliated with the Michigan Education Association. The plaintiffs are not union members. Under agency shop contracts authorized

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* The Honorable Douglas W. Hillman, United States District Judge for the Western District of Michigan, sitting by designation.

by state law, however, the plaintiffs are required to pay agency fees, or "service fees," that are divided among local, state and national unions involved in the bargaining process.

Alleging that the amount collected by the unions in 1991-92 exceeded constitutional limits, part of the fees having been based on expenditures for political, ideological, and other activities not demonstrably germane to collective bargaining, the plaintiffs sued for declaratory, injunctive and monetary relief under 42 U.S.C. § 1983. The stated purpose of the action was to vindicate the plaintiffs' First Amendment rights to freedom of speech, association, petition, belief and thought.

The plaintiffs served timely discovery requests in which they sought, among other things, identification of the people who had calculated the service fees and production of documents underlying the calculations. Discovery was stayed after the unions complied with a portion of the document request relating to the record of a service fee arbitration that had been conducted at the union's request (and in which one of the plaintiffs had participated) pursuant to *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986). (*Hudson* holds that while the decision rendered by the arbitrator in such a proceeding cannot be given preclusive effect in a subsequent § 1983 action, a union's collection of an agency fee is permissible if the union provides (1) an explanation of the basis of the fee, (2) an opportunity to challenge the fee before an impartial decisionmaker, and (3) an escrow for amounts reasonably in dispute. The plaintiffs do not deny that the unions met these conditions here.)

After unsuccessfully seeking dismissal of the § 1983 action on statute of limitations grounds, the unions moved for summary judgment on the strength of the arbitrator's decision—a decision in which the exaction of service fees in the amounts set by the unions was held not to violate the First Amendment. Although the arbitrator had not

seen the documents underlying the unions' calculation of the service fees, the unions maintained that the arbitral award was entitled to great weight in the § 1983 case even without discovery of the underlying documents.

The stay of discovery was continued during the pendency of the summary judgment proceedings, despite representations by the plaintiffs that discovery was essential to their opposition to summary judgment. The court ultimately entered summary judgment in favor of the union's without any of the plaintiffs having been furnished access to the documents in question. The decision is reported as *Bromley v. Michigan Educ. Ass'n*, 843 F.Supp. 1147 (E.D. Mich. 1994).

The central question presented on appeal is whether the court's curtailment of discovery constituted an abuse of discretion. We conclude that it did. Accordingly, and because we find merit in some, but not all, of the plaintiffs' subsidiary points, we shall vacate the judgment and remand the case for further proceedings.

I

Filed as a class action, the § 1983 case was brought by seven members of the faculty of Central Michigan University together with ten public school teachers and one public school "educational support" person. The defendants are the Michigan Education Association, seven of its local affiliates, and the Association's parent body, the National Education Association.

Each of the named plaintiffs works in a bargaining unit all of the members of which—whether or not they have chosen to join a labor union—are represented for collective bargaining purposes by one or another of the defendant unions. See Mich. Comp. Laws 423.211, under which a representative selected by the majority of public employees in a bargaining unit is made the exclusive representative of all employees in the unit.

Pursuant to Mich. Comp. Laws 423.210, the plaintiffs' employers have entered into collective bargaining agreements requiring the plaintiffs and all other non-union bargaining unit employees to pay service fees to the bargaining representatives. Each academic year the unions set the fees (which may not exceed the dues paid by union members) on the basis of "chargeable" costs incurred the year before. The money goes to the local, state and national organizations in proportion to their past expenditures on chargeable activities.

In December of 1991, pursuant to procedures established by it in light of the *Hudson* decision, the Michigan Education Association sent each non-union bargaining unit employee a packet of materials relating to the collection of service fees. Included in the packet was a statement to the effect that individuals who objected to contributing to the financial support of ideological causes or political activities unrelated to collective bargaining would be required to pay reduced fees determined by the Association on the basis of the prior school year's representation expenditures. The packet also included an explanation of the fee calculations, audited union financial statements, a description of a procedure, for challenging the fees, and a "service fee election form."

Some 236 non-union employees sent back service fee election forms on which they indicated that they wished to challenge the fees. The first named plaintiff, Robert Bromley, stated on his form that he would pay the reduced Association-determined fees (which totaled $379.20 in his case) "under protest." In addition to checking boxes signifying that he wished to challenge the state, local and national fees pursuant to the procedure described in the packet, Mr. Bromley, like several other named plaintiffs, added the following statement to his form:

> "Paid under protest. I have instructed my attorneys to pursue legal action challenging both the collection

> procedures, as applied, and the amount of the fee itself. I do not hereby waive my rights to challenge the amount of the fee in forums in addition to that provided under those procedures."

Upon receipt of the forms, the Association initiated a consolidated arbitration proceeding under rules issued by the American Arbitration Association after *Hudson* was decided. The rules (entitled "Rules for Impartial Determination of Union Fees") provide that the American Arbitration Association shall appoint an impartial arbitrator at the instance of the union. The union compensates the arbitrator and pays the American Arbitration Association a fee as well. The arbitrator is to be "experienced in employment relations," according to the rules, and is to render a prompt decision "in accordance with applicable law and the union's internal procedures . . . ." Prospective arbitrators are subject to challenge for cause, but the rules contain no provision for peremptory challenges.

Neither do the rules provide for pre-hearing discovery. Rule 14 does say, however, that "[t]he parties may offer such evidence as they desire and shall produce such additional evidence as the arbitrator may deem necessary to an understanding and determination of the dispute." Conformity to the rules of evidence is not necessary, but the arbitrator may require that witnesses give their testimony under oath.

The arbitrator who was appointed in this instance, a Mr. Barry C. Brown, conducted hearings on March 18, 19, and 23, 1992. Counsel for the unions were present, along with various union employees and a certified public accountant engaged by the unions. Three individual "objectors and observers" appeared, only one of whom—Thomas Reed—was to become a named plaintiff in the present § 1983 action. None of the three objectors was

accompanied by a lawyer, although the rules permitted representation by counsel or others.[1]

In consonance with a line of Supreme Court caselaw that includes *Railway Clerks v. Allen*, 373 U.S. 113 (1963), *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), and *Hudson*, the Arbitration Association rules state that "[t]he burden is upon the union to justify whatever fees are being disputed."[2] In the proceeding before Mr. Brown, the unions sought to discharge their burden through a comprehensive overview of the unions' cost structure presented by witnesses whose testimony was accompanied by a series of summary exhibits. One of the witnesses testified that outside auditors were given full exposure to all documentation used in determining the fees, but none of the three objectors asked Mr. Brown to require production of the underlying documentation as "additional evidence" under Rule 14. We do not know how Mr. Brown would have responded to such a request.

The objectors posed some questions to the union's witnesses and "made their views known to the arbitrator," as Mr. Brown put it in his decision. Post-hearing briefs were filed by the state and national unions, but none of the objectors filed a brief.

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[1] A non-profit foundation that is providing counsel for the plaintiffs in the § 1983 case circulated a form letter in December of 1991 advising prospective challengers that the foundation lacked the resources to provide attorneys and accountants in the arbitration proceeding. The letter stated that arbitration was not likely to provide as much relief as a court suit. Seventeen of the 18 named plaintiffs chose not to participate in the arbitration proceeding.

[2] "Since the unions possess the facts and records from which the proportion of political to total union expenditures can reasonably be calculated, basic considerations of fairness compel that they, not the individual employees, bear the burden of proving such proportion." *Allen*, 373 U.S. at 122, as quoted in *Abood*, 431 U.S. at 239-40 n.40, and *Hudson*, 475 U.S. at 306.

Mr. Brown issued his decision approving the union's fees on April 16, 1992. The plaintiffs brought their § 1983 action the following October.

The defendant unions promptly raised their statute of limitations defense in a motion for judgment on the pleadings. While that motion was pending, the plaintiffs served the defendants with interrogatories asking for (a) identification of the people who had participated in preparing and auditing the schedules of expenditures on which the service fees were based, and (b) a statement of the dollar amount of each category of expenditures. The plaintiffs also served a document production request covering (a) the arbitration record, (b) the election forms returned by non-members who challenged the service fees, and (c) "documents underlying, used in, created during, or otherwise related to defendants' calculations, and their auditors' examinations, of defendants' schedule of chargeable and nonchargeable expenditures on which the service fees for 1991-92 were based . . . ."

The defendant unions gave the plaintiffs the arbitration record and the election forms, but declined to answer the remaining discovery requests. The unions sought a protective order blocking all other discovery.

In a series of orders issued before and after its denial of the motion for judgment on the pleadings, the district court declined to allow any further discovery. When the unions moved for summary judgment, the plaintiffs filed papers advising the court that there had been no showing of good cause for preventing discovery of non-privileged matters relevant to the subject matter of the case; that determination of the constitutionality of the unions' classification of expenses as chargeable to objecting non-members required "specific identification of the activities involved;" and that discovery of these facts—facts solely within the possession of the unions—was essential for opposition to the summary judgment motion. Pursuant to

Rule 56(f), Fed. R. Civ. P., the plaintiffs moved to stay consideration of the summary judgment motion until completion of discovery.

The court denied the stay, commenting that the record of the arbitration gave the plaintiffs "everything they need to enable them to respond to the defendants' motion for summary judgment." This position was subsequently reaffirmed in the published opinion granting summary judgment.

"But for the arbitration proceedings and award," the district court acknowledged in its published opinion, "extensive discovery would be fully justified." *Bromley*, 843 F.Supp. at 1151. Because the plaintiffs had been accorded an opportunity to participate in the arbitration proceeding, however, the court found that the discovery requests at issue "were unduly burdensome within the meaning of Fed. R. Civ. P. 26(b)(1)." *Id.* at 1153. "Had some of the issues raised by the defendants [sic] been brought to the arbitrator's attention," the court said in conclusion, "it is not unlikely that the arbitrator would have required the unions to provide some additional records." *Id.* at 1157. But the arbitrator not having been asked to provide access to the underlying records, the court was unwilling to grant the plaintiffs access to them itself.

The plaintiffs have perfected a timely appeal from the final judgment in which the district court dismissed their complaint.

II

"[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." Thus wrote Thomas Jefferson in a passage quoted in I. Brant, *James Madison: The Nationalist* 354 (1948), and repeated with approval by the Supreme Court in *Abood*, 431 U.S. at 234 n.31, and *Hudson*, 475 U.S. at 305 n.15.

Jefferson's thought is now part and parcel of our First Amendment jurisprudence. For the government to threaten men and women with the loss of their livelihoods if they fail to remit part of their earnings to labor unions for the advancement of social and political causes they do not wish to support is not only sinful and tyrannical, it is a violation of the United States Constitution. *See Abood*, 431 U.S. at 234; *Hudson*, 475 U.S. at 301-02.

To an extent, the Supreme Court has recognized, the very existence of an agency shop trenches upon the First Amendment interests of bargaining unit employees who oppose unions. See *Hudson*, 475 U.S. at 309 ("the agency shop itself impinges on the nonunion employees' First Amendment interests"), and *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 519 (1991), where the Court spoke of "the burdening of free speech that is inherent in the allowance of an agency or union shop." But in a constitutional compromise not atypical of the many such compromises that have been struck since the founding of the Republic, the Supreme Court has decided to let all bargaining unit employees be required to bear the cost of collective bargaining activities—thereby denying a "free ride" to non-union employees who might stand to benefit from such activities—while not allowing "compulsory subsidization of ideological activity by employees who object thereto . . . ." *Abood*, 431 U.S. at 237.

Courts must proceed case-by-case in determining which union expenditures are chargeable to dissenting employees and which are not. Such determinations are frequently difficult (particularly in the case of expenditures for activities that may not be overtly ideological but that bear only a peripheral relation to bargaining for the members of the unit), and the guidance provided by the Supreme Court is somewhat general in nature. See, for example, *Ellis v. Railway Clerks*, 466 U.S. 435, 448 (1984):

> "[T]he test must be whether the challenged expenditures are necessarily or reasonably incurred for the

> purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues. Under this standard, objecting employees may be compelled to pay their fair share of not only the direct costs of negotiating and administering a collective-bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit."

Cf. Lehnert, 500 U.S. at 519:

> "[C]hargeable activities must (1) be 'germane' to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding 'free riders'; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop."

But wherever the line between the chargeable and the nonchargeable may be drawn in a particular case, the Supreme Court's decisions leave no room for doubt that there is a line somewhere beyond which the unions may not go without violating the Constitution.

To protect the constitutional rights of all citizens of the United States, 42 U.S.C. § 1983 recognizes a cause of action against any person who, acting under color of law, subjects another to the deprivation of rights secured by the Constitution. And the district courts established by Congress pursuant to Article III of the Constitution have been given original jurisdiction over civil actions brought to recover damages or to secure equitable or other relief under any Act of Congress, including § 1983, providing for the protection of civil rights. See 28 U.S.C. § 1343 (a)(4).

The statutory right to have an Article III court adjudicate suits brought pursuant to § 1983 for vindication of

rights secured by the First Amendment of the Constitution cannot be foreclosed by non-statutory arbitration conducted by a privately appointed decisionmaker. See *McDonald v. City of West Branch, Mich.*, 466 U.S. 284 (1984), where a unanimous Supreme Court, speaking through Justice Brennan, so held in reversing a decision in which our own court had given *res judicata* effect to the decision of a private arbitrator appointed pursuant to a collective bargaining agreement. See also *Alexander v. Gardner-Denver, Co.*, 415 U.S. 36 (1974), holding that an arbitral award entered pursuant to a collective bargaining agreement cannot foreclose a suit brought under Title VII of the Civil Rights Act of 1964.

The arbitration initiated by the defendant unions here was conducted under the procedure outlined by the Supreme Court in *Hudson*, of course, and not under a collective bargaining agreement. But *Hudson* did not purport to foreclose the remedy provided for in § 1983. Citing *McDonald*, on the contrary, the *Hudson* Court expressly recognized that "[t]he arbitrator's decision would *not* receive preclusive effect in any subsequent § 1983 action." *Hudson*, 475 U.S. at 308 n.21. (Emphasis supplied.) *Cf. McDonald*, 466 U.S. at 292: "courts should ever be mindful that Congress . . . thought it necessary to provide a judicial forum for the ultimate resolution of [these] claims. It is the duty of the courts to assure the full availability of this forum." *Id.* at 292 n.13, quoting *Gardner-Denver*, 415 U.S. at 60 n.21.

This is not to say that, under appropriate circumstances, an arbitral decision may not be given considerable weight in the adjudication of § 1983 actions. The weight to be accorded such a decision depends, however, on the facts and circumstances of the particular case. Again quoting *Gardner-Denver*, *id.* at 60 n.21, *McDonald* says that among the factors relevant in this regard are these:

> "the degree of procedural fairness in the arbitral forum, adequacy of the record with respect to the

> issue [in the judicial proceeding], and the special competence of particular arbitrators. Where an arbitral determination gives full consideration to an employee's [statutory or constitutional] rights, a court may properly accord it great weight. This is especially true where the issue is solely one of fact, specifically addressed by the parties and decided by the arbitrator on the basis of an adequate record." *McDonald*, 466 U.S. at 292 n.13.

Reviewing these factors in relation to the record before us in the case at bar, we are not persuaded that the district court was justified in accepting the arbitrator's endorsement of the unions' cost allocations without allowing discovery of the materials on which the calculations were based. Our thinking on this runs as follows.

" '[P]rocedural safeguards often have special bite in the First Amendment context.' G. Gunther, Cases and Materials on Constitutional Law 1373 (10th ed. 1980). * * * The purpose of these safeguards is to insure that the government treads with sensitivity in areas freighted with First Amendment concerns." *Hudson*, 475 U.S. at 303 n.12. Among the procedural safeguards available in a judicial forum are rules of evidence that treat hearsay with skepticism, and discovery procedures that allow litigants to probe their adversaries' cases in depth prior to hearing. These safeguards were much attenuated here.

The case presented to the arbitrator rested primarily on hearsay—upon summaries of documents that were not presented in evidence and had not been made available for inspection by dissenters prior to the arbitration hearing. It is true that the arbitrator had authority under the Arbitration Association rules to order the production of "such additional evidence" as he might have deemed necessary to his "understanding and determination of the dispute." But it would not be realistic, in our view, to expect the arbitrator to go through raw data at the hearing as thoroughly as litigants commonly go through such

data in pre-hearing discovery. And like the rules of evidence, pre-hearing discovery has been dispensed with under the rules that govern arbitrations such as this one.

Even if the arbitration rules had been a mirror image of the Federal Rules of Civil Procedure, moreover, they would not necessarily have insured the adequacy and reliability of the arbitral record in this particular case. The fact is that arbitrator Brown—a man who is experienced in labor relations, presumably, but who has not been shown to possess any special competence in First Amendment law—was not provided record information that had been vetted prior to the hearing in such a way as to inspire confidence that it could appropriately be used as the basis of a definitive determination of the objectors' First Amendment claims.

The absence of a record containing information that had been so vetted is by no means surprising. "[A]rbitral factfinding is generally not equivalent to judicial factfinding." *McDonald*, 466 U.S. at 291. "The record of the arbitration proceeding is not as complete; the usual rules of evidence do not apply; and *rights and procedures common to civil trials, such as discovery . . . are often severely limited or unavailable.*" *Gardner-Denver*, 415 U.S. at 57-58. (Emphasis supplied.) Thus it is that in a § 1983 action, at least, "an arbitration proceeding cannot provide an adequate substitute for a judicial trial." *McDonald*, 466 U.S. at 292.

But if an arbitration proceeding is no substitute for a judicial trial, the district court concluded that the arbitral award ought to have a "significant impact in subsequent judicial proceedings . . . ." *Bromley*, 843 F.Supp. at 1153. Otherwise, the court suggested, "the procedure spawned by the Supreme Court is largely a waste of time and money." *Id.*

If in practical terms the "impact" of an arbitral award on subsequent judicial proceedings is to be the denial of meaningful pre-trial discovery, we do not believe that the

"waste of time and money," if any, can justify such a denial. The right to discovery is a safeguard which—to borrow the language of *Hudson* again—helps "insure that the government treads with sensitivity in areas freighted with First Amendment concerns." *Hudson*, 475 U.S. at 303 n.12.

It is far from self-evident, moreover, that *Hudson* arbitration would in fact become a waste of time and money unless its availability were held to foreclose normal pre-trial discovery. As the Supreme Court of California recently observed in rejecting a "waste of time" argument based on the district court's opinion in the case at bar, "the time is not wasted if it offers a potential for avoiding litigation." *Brosterhous v. State Bar of California*, 12 Cal. 4th 315, 333, 902 P.2d 1242, 1253 (1995) (citing *Hohe v. Casey*, 956 F.2d 399, 409 (3d Cir. 1992)). If *Hudson* arbitrators do their job properly, it seems to us, the probability is that some of these controversies will not reach the courts at all.

The defendant unions have invited our attention to another case, *Miller v. Air Line Pilots Assn*, No. 91-3161 (D.D.C. August 30, 1995) (unpublished), where the "waste of time and money" argument received a more favorable reception. The *Miller* court went so far as to hold, indeed, as a matter of "judicial discretion," that arbitration remedies made available by a union under *Hudson* must be exhausted as a precondition to any non-member's bringing a civil rights action under § 1983. If the exhaustion principle were to be applied in the case before us, of course, only three of the 236 non-members who objected to the agency fee would have standing to challenge the amount of the fee in court.

In support of its ruling on the exhaustion issue, the *Miller* court quoted extensively from a decision issued in the *Hudson* litigation by the United States Court of Appeals for the Seventh Circuit following remand from the Supreme Court. *Hudson v. Chicago Teachers Union*, 922

F.2d 1306 (7th Cir.), *cert. denied*, 501 U.S. 1230 (1991). The quoted passage begins with this sentence:

> "Requiring the Federal courts to micromanage the fee calculation in every case challenging a union's [agency] fee would place an overwhelming and unrealistic burden on the courts." *Hudson*, 922 F.2d at 1314.

Taken out of context, the passage sounds like a powerful argument in favor of an exhaustion requirement. In fact, however, we have no reason to suppose that this was what the Seventh Circuit panel had in mind.

The question being addressed by the panel was whether the notice containing the union's explanation of the basis on which the amount of the agency fee had been determined was adequate to pass constitutional muster. The plaintiffs were arguing not only that the notice was inadequate—a proposition they did not push very hard—but also that the correctness of the amount had to be adjudicated in court *before the fee could be collected and escrowed in the first instance*. That was the argument to which the Seventh Circuit panel was responding, as is clear from the sentence immediately before the passage quoted in *Miller*:

> "Taken in its entirety, plaintiffs' challenge asserts that a *prior* hearing and *prior* judicial determination of the correctness of [an agency] fee is a precondition to the *collection* of the fee." *Hudson*, 922 F.2d at 1314. (Emphasis supplied.)

In rejecting the plaintiffs' argument, the Seventh Circuit panel did not hold that exhaustion of the arbitral remedy could be required as a condition to the bringing of a § 1983 action. The exhaustion issue was not before the panel at all, as we understand it.

In any event, a panel of our own court has squarely rejected the proposition that it is constitutional for an agency shop agreement to require objecting employees to

exhaust their arbitration remedies before going into court on their constitutional claims. *Tierney v. City of Toledo*, 917 F.2d 927, 939-40 (6th Cir. 1990) (endorsing a district court's resolution of a comparable issue in *Lowary v. Lexington Local Bd. of Educ.*, 704 F.Supp. 1456 (N.D. Ohio 1988), *aff'd on other grounds*, 903 F.2d 422 (6th Cir.), *cert. denied*, 498 U.S. 958 (1990)).

In the case at bar the district court quoted language from this court's decision in *Lowary*—language that was also quoted in *Weaver v. University of Cincinnati*, 970 F.2d 1523 (6th Cir. 1992), *cert. denied*, 507 U.S. 917 (1993)—to the effect that "the Supreme Court has suggested that courts should not involve themselves in factual inquires involved in making a chargeability determination." *Lowary*, 903 F.2d at 433, and *Weaver*, 970 F.2d at 1535, citing *Allen*, 373 U.S. at 123-24, and *Abood*, 431 U.S. at 240, with a "see also" reference to a 1987 Sixth Circuit decision in the *Tierney* litigation, reported at 824 F.2d 1497, 1504-05. None of these cases can fairly be read as foreclosing the discovery sought by the plaintiffs here.

Lowary merely suggested that the district court was not required to conduct a trial to determine chargeability if an independent arbitrator had already made that determination and the plaintiff employees had not taken issue with the content of the arbitrator's decision. The plaintiffs in *Lowary*, as the panel was at pains to point out, "[did] not claim that the decisionmaker's determinations were improper." *Lowary*, 903 F.2d at 433. The *Lowary* plaintiffs were objecting only to "the use of the procedure," not to the substantive result produced thereby. *Id.*[3] In

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[3] The *Lowary* panel also pointed out that under *Hudson*, a chargeability determination by an independent arbitrator would not receive preclusive effect in a subsequent § 1983 action. The panel went on to note that the arbitrator's determination "likely would be entitled to great weight," 903 F.2d at 433 n.3, but this obviously

the case at bar, by contrast, the plaintiffs *are* objecting to the substantive result reached by the arbitrator; here the plaintiffs do indeed "claim that the decisionmaker's determinations were improper."

The pertinent challenge to the arbitrator's decision in *Weaver* was based on a "sequence of adjudication" argument; the plaintiffs contended that "an arbitrator should not determine which portion of the exacted fees were chargeable to nonmember employees before a district court decides the merits of a constitutional challenge to the union's collection procedures." *Weaver*, 970 F.2d at 1534. The *Weaver* panel rejected that argument, relying on the reasoning of *Hudson* and *Lowary*. *Weaver*, 970 F.2d at 1535. No corresponding argument has been presented in the case at bar.

The *Weaver* panel was not called upon to decide whether employees taking exception to the merits of arbitral chargeability determinations can be denied the right to probe the factual underpinnings of summary exhibits on which the arbitrator relied in making such determinations. *Weaver*, as we read it, simply does not support the denial of discovery in the case at bar. Neither does *Allen*, 373 U.S. at 123-24, where the Court merely "remind[ed] the parties of the availability of more practical alternatives to litigation," or *Abood*, 431 U.S. at 240, which echoed *Allen*, or *Tierney*, 824 F.2d at 1504-05, where the point deemed "important" by the court was that "the dissenting non-union member can be compelled

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presupposes a determination based on an adequate and reliable record.

In the case at bar, further discovery may show both that the summaries on which the arbitrator relied were accurate and that the expenses summarized therein were incurred for purposes that qualified as chargeable under the tests prescribed by the Supreme Court. To the extent that the summaries gave the arbitrator an accurate picture of the underlying facts, and assuming reasonable competence on the part of the arbitrator, the arbitrator's decision will likely be entitled to great weight in that event.

through arbitration or otherwise to pay for only those sums which are fairly attributable to [collective bargaining] agreement-related purposes . . . ." *Id.* at 1505.

Given the importance of the constitutional interests at stake in the case at bar, the district court should not have decided the summary judgment motion without allowing meaningful discovery first. In declining to allow any discovery beyond the arbitration record and the election forms, it seems to us, the district court clearly abused its discretion.

III

The plaintiffs claim to have identified two categories of expenditures that ought to have been held "nonchargeable as a matter of law: expenditures for "extra-unit litigation" and for "defensive organizing."

Extra-unit litigation means litigation that does not directly concern the particular bargaining unit in which the objecting employee works. Whether the objecting employee can be required to contribute to the cost of such litigation proved to be a difficult question for our panel in light of the Supreme Court's fractured decision in *Lehnert*, 500 U.S. 507. The question has now been answered in the affirmative by *Reese v. City of Columbus*, 71 F.3d 619 (6th Cir. 1995), however, and *Reese* is binding on us under our circuit precedent rule. On remand, therefore, reasonable extra-unit litigation costs should be treated as chargeable.

Defensive organizing, as used here, covers a wide range of activities designed to protect and strengthen the status of unions that have already achieved bargaining agent recognition. The rubric includes, among other things, membership retention efforts, resistance to decertification proceedings, and defense against challenges from other unions.

In *Ellis* the Supreme Court held that it would be "perverse" to allow unions to force objecting nonmembers

to fund the union's "costs of attempting to convince them to become members." *Id.*, 466 U.S. at 452 n.13. We think it would be equally perverse to require the plaintiffs to help underwrite actions designed solely to allow the union to perpetuate itself by maintaining the loyalties of existing members. See *Reese v. City of Columbus*, 798 F. Supp. 463, 470 (S.D. Ohio 1992), *rev'd on other grounds*, 71 F.3d 619, where the court explained that "[d]efensive organizing would serve only the union's self-interest in perpetuating itself as the sole representative of the bargaining unit, a goal which is not germane to collective bargaining activity and which may add to the burden on an objector's First Amendment rights since the objector may favor some other union or no union." On remand, defensive organizing costs that serve only this purpose should be treated as non-chargeable.

The plaintiffs contend that there is a genuine issue of material fact, at least, as to whether certain categories of administrative costs that were treated as chargeable in their entirety should instead have been allocated proportionally between chargeable and non-chargeable activities, as were other overhead costs. We agree. In opposing the motion for summary judgment, the plaintiffs submitted an affidavit in which Irving B. Ross, a certified public accountant with a wealth of relevant experience, raised serious questions about the treatment of the administrative costs at issue. These questions should be addressed by the district court after the plaintiffs have had a reasonable opportunity to conduct discovery.

The plaintiffs further contend that there is a genuine issue of fact as to the reasonableness of the method used by the unions in calculating the chargeable portion of two programs—known as "UniServ" and the "Unified Legal Service Program"—under which the National Educational Association makes grants to its state affiliates. Expenditures for these programs were allocated according to the chargeable percentage of funds given to the Michigan

Education Association, and not according to the chargeable percentage of funds given across the country.

The plaintiffs' expert witness, Mr. Ross, expressed the opinion in his affidavit that "there is no basis in generally accepted accounting procedures that supports allocating all of NEA's UniServ and ULSP expenditures based on percentages derived from a single agency fee state affiliate . . . ." Mr. Ross did not explain how he reached this conclusion, however, and on the record before us we are constrained to say that the allocation method used by the unions appears reasonable.

Finally, the plaintiffs point out that they filed a motion for class certification that was denied solely because the grant of summary judgment rendered it moot. The motion will not be moot when the summary judgment is vacated, of course, and we assume that the district court will revisit the class certification question in due course.

For the reasons stated we VACATE the order in which the plaintiffs' complaint was dismissed pursuant to Rule 56, Fed. R. Civ. P., and we REMAND the case for further proceedings not inconsistent with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

Case No. 92-CV-10443-BC

ROBERT G. BROMLEY, PHILIP L. KINTZELE, KARL R. LINDFORS, FREDERICK M. PHELPS III, KEN W. SMITH, JOHN B. MITCHELL, J. CARROLL ARNETT, ELLA M. GREGORICKA, THOMAS B. REED, THOMAS E. FAHLSTROM, TERRY L. APPS, SANDRA L. CONROY, CHARLENE L. MERRILL, VICKY L. NIEWOONDER, SALLY J. REDINGER, GORDON E. THOMAS, JAMES W. TROWBRIDGE, and SHIRLEY A. TWIETMEYER,

Plaintiffs,

v.

MICHIGAN EDUCATION ASSOCIATION-NEA, NATIONAL EDUCATION ASSOCIATION, CENTRAL MICHIGAN UNIVERSITY FACULTY ASSOCIATION, FERRIS FACULTY ASSOCIATION, GROSSE POINTE EDUCATION ASSOCIATION, GROSSE POINTE ASSOCIATION OF EDUCATIONAL OFFICE PERSONNEL, LANSING SCHOOLS EDUCATION ASSOCIATION, MENDON EDUCATION ASSOCIATION, and TRAVERSE CITY EDUCATION ASSOCIATION,

Defendants.

MEMORANDUM OPINION

In this action eighteen public college and public school employees, who are not members of the union which is their collective bargaining unit representative, allege that

the union is attempting to collect service fees for the 1991-92 *school* year for *constitutionally* nonchargeable purposes.

The plaintiffs seek a declaratory judgment, injunctive relief, damages and attorney fees. They also seek class certification on behalf of all public employees who are required to pay a service fee to the union and who have challenged or will challenge the amount of the fee for 1991-92 and/or subsequent school years.[1] The plaintiffs assert violation of rights protected by the First and Fourteenth Amendments to the Constitution of the United States. They seek relief pursuant to 42 U.S.C. § 1983 and 42 U.S.C. § 1988. Jurisdiction is invoked pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1343.

Robert G. Bromley and six other plaintiffs were employed during the 1991-92 school year as faculty members of Central Michigan University, a state university located in Mt. Pleasant, Michigan. Each of the other eleven plaintiffs was employed, during the same school year, as teachers by the boards of education of one of several public schools throughout the State of Michigan.

Each of the plaintiffs was employed in a collective bargaining unit whose employees were represented, for collective bargaining purposes, by local affiliates of the Michigan Education Association (MEA) and the National Education Association (NEA). Under the union organizational structure, membership in a local affiliate constitutes membership in the state and national organizations. Members are required to pay dues to all three levels of the organization.

Pursuant to the collective bargaining agreements governing the plaintiffs' terms of employment, each of the plaintiffs is required to pay a service fee, a part of which is distributed to each level of the union organization.

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[1] The service fee for the school year 1991-92 is based upon activities and expenditures in the prior fiscal year.

This service fee requirement is authorized pursuant to Mich. Comp. Laws § 423.210. The Michigan service fee statute was specifically approved in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

In *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), the Supreme Court established the foundation for a procedure for the determination of collective bargaining service fees by employees who are not members of the union. The Court stated:

> We hold today that the constitutional requirements for the Union's collection of agency fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending.

Hudson, 475 U.S. at 310.

The MEA developed procedures which comply with *Hudson*. *Lehnert v. Ferris Faculty Association-MEA-NEA*, 707 F. Supp. 1490 (W.D. Mich. 1989); *aff'd*, 893 F.2d 111 (6th Cir. 1989), *cert. denied sub nom., Lindsey v. Ferris Faculty Ass'n*, 496 U.S. 905 (1990). The procedures followed by the union in this case were identical to those which have been judicially approved.

The union made an initial determination of the service fees to be charged to employees who did not pay union dues. The union sent a packet of information to each such employee. The packet of information contained a form which an employee could complete and return to challenge the tentatively established service fee. For the school year 1991-92, among all of its collective bargaining units, 236 employees, including the 18 plaintiffs, notified the union that they wished to challenge the 1991-92 service fee by checking the appropriate box on the objection form and by returning it to the union.

This action by the plaintiffs and others triggered the arbitration process.

Pursuant to its own Rules for Impartial Determination of Union Fees, the American Arbitration Association (AAA) appointed Arbitrator Barry C. Brown to arbitrate the dispute.

The fees that the defendants endeavor to collect are those which were determined to be appropriate in an Arbitration Opinion and Award issued by Arbitrator Barry C. Brown on April 16, 1992, following a three-day hearing in March, 1992. This suit was commenced October 6, 1992.

The Court has under advisement following oral argument, the defendants' motion for summary judgment.

The defendants' motion for summary judgment is based upon the findings and award of the arbitrator.

The issues that were briefed and argued on the defendants' motion for summary judgment fall into four categories:

1. The impact of *Hudson*-type arbitration on the scope of discovery in a subsequent action pursuant to 42 U.S.C. § 1983.
2. The impact of *Hudson*-type arbitration on the manner in which factual issues are defined and resolved in a subsequent § 1983 action.
3. The chargeability of specified categories of expenses.
4. The appropriateness of accounting procedures approved by the arbitrator.

I.

The necessity to determine the impact of *Hudson*-type arbitration arises in this case, in the first instance, in the context of the scope of discovery.

The plaintiffs' first set of interrogatories asked the defendants to (a) identify the persons who participated

in the defendants' calculations, and their auditors' examinations, of defendants' schedules of chargeable and nonchargeable expenditures on which the service fees for 1991-92 were based; and (b) to state the amounts which the defendants spent on each of the categories of chargeable and nonchargeable activities used by the defendants in making those calculations. The requests for production of documents asked the defendants to produce the record in the AAA proceeding; other documents underlying, used in, created during, or otherwise related to the defendants' calculations, and their auditors' examinations, of the schedules of chargeable and nonchargeable expenditures on which the fees for 1991-92 were based; and the objection forms submitted by nonmembers who challenged those fees.

The defendants provided the plaintiffs with the record in the arbitration proceeding and the objection forms submitted by the nonmembers who challenged fees.

The defendants sought a protective order against further discovery. The plaintiffs sought a stay of the defendants' motion for summary judgment pending completion of discovery.

It was apparent to the Court that the arguments concerning these motions transcended normal discovery issues and raised issues of substantial significance. It was the opinion of the Courts that the discovery issue could best be dealt with in the context of the defendants' motion for summary judgment. The Court conditionally granted the stay and required the plaintiffs to respond to the defendants' motion for summary judgment without further discovery. The Court did not, however, limit the evidence which plaintiffs could submit in support of their response to the defendants' motion for summary judgment.

The defendants have the burden of proof with respect to chargeability. The defendants collectively are a large and complex organization. Their financial affairs are complex. But for the arbitration proceedings and award,

extensive discovery would be fully justified. The focus of the discovery issue has been on the impact of arbitration.

The plaintiffs' position is unequivocal. Relying on the *Gardner-Denver* [2] and *McDonald* [3] line of cases [4] and on the statement in *Hudson* that an arbitrator's decision would not receive preclusive effect in any subsequent Section 1983 action, the plaintiffs' position is that they are entitled to proceed through pretrial proceedings including discovery as though the arbitration proceedings had never taken place.

The defendants offer two arguments for limiting discovery.

First, the defendants assert that, in light of the arbitration proceedings, the Court should determine that the plaintiffs' discovery requests are unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of issues at stake in the litigation, and that the Court should limit discovery pursuant to Fed. R. Civ. P. 26(b)(1).

Second, the defendants assert that the discovery sought by the plaintiffs is not relevant and material to the issues before the Court. This argument is complex.[5] The defendants' position can best be explained by quoting directly from their brief in support of their motion for protective order.

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[2] *Alexander v. Gardner-Denver Company*, 415 U.S. 36, 94 S. Ct. 1011, 39 L. Ed. 2d 147 (1974).

[3] *McDonald v. City of West Branch*, 466 U.S. 284, 104 S. Ct. 1799, 80 L. Ed. 2d 302 (1984).

[4] *See also Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 101 S. Ct. 1437, 67 L. Ed. 2d 641 (1981).

[5] If their argument is ambivalent, it is because the courts themselves have been ambivalent in explaining the impact of *Hudson*-type arbitration awards and proceedings upon subsequent law suits.

The Sixth Circuit has emphasized that arbitration is the "legitimate first step in the *Hudson* sequence of proceedings." *Weaver* [*v. University of Cincinnati*], 970 F.2d [1523,] 1536 [(6th Cir. 1992) *cert. denied sub nom., Weaver v. Steger,* 122 L. Ed. 2d 668 (1993)]. Arbitrators decisions regarding the constitutionality of charging various expenses to non-members "are then *subject to review* by a court at the parties' request." *Id.* at 1536 (emphasis added). While the arbitrator's decision does not have preclusive effect (*Hudson,* 475 U.S. at 308, n.21), "an arbitrator's decision on the propriety of the chargeability definitions and calculations may be given deferential treatment by a district Court" (*Weaver* [*v. University of Cincinnati*], 764 F. Supp. [1241,] 1246 [(S.D. Ohio 1991)]) and be entitled to "great weight." *Lowary v. Lexington Local Board of Education,* 903 F.2d 422, 433, n.3 [(6th Cir.); *cert. denied sub nom., Lowary v. Lexington Teachers Ass'n.,* 498 U.S. 958 (1990)]. *Weaver* made it clear a district court may, *without an evidentiary hearing* (764 F. Supp. at 1246), "examine and ultimately ratify determinations made by a properly selected arbitrator upon a finding that an arbitrator's decision was correct." 970 F.2d at 1536. And the Supreme Court and Sixth Circuit have cautioned district courts against becoming involved in the "factual inquiries involved in making a chargeability determination." *Lowary,* 903 F.2d at 433, citing [*Brotherhood of R. & S.S. Clerks, etc. v.*] *Allen,* 373 U.S. [113,] 123-24 [(1963)]; *Abood,* 431 U.S. at 240; *Tierney v. City of Toledo,* 824 F.2d 1497, 1504-05 (6th Cir. 1987). *Weaver* reaffirmed this proscription. 970 F.2d at 1535-36. ("Courts should *not* involve themselves in the factual inquires involved in making a chargeability determination") (emphasis added).

Under the procedural, and substantive framework thus established, the court's role in reviewing service

> fee arbitration awards is to review the union's definition of chargeable activities. Whether a union's definition of chargeable activities is in accordance with applicable law is a legal question for the Court. . . . If the Court determines the union's definitions are constitutionally appropriate, it may and should defer to the factual findings of the arbitrator. This approach is in keeping with precedent and recognizes the procedural and substantive framework balancing the important rights of all the participants in the service fee process, as well as the resources of the federal judiciary.

Defendants Brief in Support of Motion for Protective Order, 8-9.

The parties each seek from the Court a comprehensive rule. What they have a right to expect in the District Court is a clear and reasoned rule which applies in the circumstances of this case. The significant circumstances of this case are as follows:

1. Each of the plaintiffs did elect to challenge the union's chargeability determination by filing a form which initiated arbitration.[6]

2. The arbitration proceedings were conducted in full compliance with the Rules for Impartial Determination of Union Fees.

3. The record of proceedings does not disclose that there were significant conflicts of evidence with respect to material facts.

4. Although some of the plaintiffs did attend the hearings, none of the plaintiffs asked the arbitrator to require the unions to submit additional evidence or documents.

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[6] In the Court's view, this circumstance and the fact that the suit was commenced after the issuance of the arbitration award should not be significant circumstances. The "exhaustion" issue, however, is not within the scope of this opinion.

5. This suit was commenced after the issuance of the arbitration award.

6. The issue in the suit involves computation of the amount of fees which are chargeable.[7]

In *McDonald*, the Supreme Court summarized reasons for not giving *res judicata* or collateral effect to the arbitrator's decisions in *Gardner-Denver*, *Barrentine* and *McDonald*. Congress intended the statutes at issue in those cases to be judicially enforceable. Arbitration could not provide an adequate substitute for judicial proceedings under 42 U.S.C. § 1983. The reasons for this conclusion were explained. The arbitrator's expertise pertains to the law of the shop, not the law of the land. The arbitrator's authority to provide relief derives from contract, not from public law. The employee's presentation in arbitration is controlled by the union, not by the employee. Arbitral factfinding is generally not equivalent to judicial factfinding because " '[t]he record of arbitration proceedings is not as complete; the usual rules of evidence do not apply; the rights and procedures common to civil trial, such as discovery, compulsory process, cross-examination, and testimony under oath are often severely limited or unavailable.' " *McDonald*, 466 U.S. at 291, *quoting Gardner-Denver*, 415 U.S. at 57-58.

Arbitration pursuant to the Rules for Impartial Determination of Union Fees is significantly different from the contractual arbitration described in *McDonald*. *Hudson*-type arbitration includes the following characteristics:

1) The arbitrator's expertise includes the public law which has been judicially developed to determine chargeability;

2) The arbitrator's authority can be directly traced back to the Supreme Court mandate in *Hudson*; and

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[7] According to the plaintiffs' attorney at oral argument, and this contention was not challenged by the defendants' attorney, this is the first case since *Hudson* that involves this issue.

3) The employee controls his or her own presentation to the arbitrator.

The arbitral fact-finding in *Hudson*-type arbitration is not equivalent to judicial fact-finding, but it is designed to be as close to judicial fact-finding as is possible in an arbitral setting. The rules place the burden upon the union to justify fees which are being disputed. The rules include the right to be represented by counsel, the right to have a stenographic record, the sequestration of witnesses, adjournments for cause, provision for requiring witnesses to testify under oath and the opportunity for each party to present evidence. Although there is no discovery per se, the rules specifically provide that the parties shall produce such additional evidence as the arbitrator may deem necessary to an understanding and determination of the dispute.

The rules are broad enough to enable a party to identify areas of factual dispute upon which chargeability turns and, for that matter, to seek a favorable resolution of identified factual issue by the arbitrator.

It is the opinion of the Court that under the circumstances of this case which are outlined above, the plaintiffs' shotgun-type interrogatories and requests for the production of documents were unduly burdensome within the meaning of Fed. R. Civ. P. 26(b)(1).

The order to be entered will confirm the conditional ruling granting the defendants' motion for a protective order. The defendants' motion for summary judgment will be determined on the record before the Court.

II.

As with respect to discovery, it is the plaintiffs' position that in the resolution of substantive issues, whether by summary judgment or trial, the proceedings leading to

arbitration and the arbitration proceedings themselves can be virtually ignored.[8]

The defendants' position is that if the Court determines that the unions' definitions are constitutionally appropriate, the Court may and should defer to the factual findings of the arbitrator.

Although there is no definitive Supreme Court or Sixth Circuit precedent on this issue, the problem has been anticipated.

Unless the arbitration award is to have a significant impact in subsequent judicial proceedings, the procedure spawned by the Supreme Court is largely a waste of time and money.

The Sixth Circuit in *Lowary*, 903 F.2d at 433 and again in *Weaver*, 970 F.2d at 1535 expressed the view that "the Supreme Court has suggested that courts should not involve themselves in factual inquires involved in making a chargeability determination." See the quotation from the defendants' brief on pages 7-8 of this opinion.

Diligent review by courts of the categories of activities deemed chargeable by unions is the most important step that courts may take to protect First Amendment values.

If auditors and arbitrators perform their roles in an adequate manner, the risks of burdening free speech is further diminished. The AAA's Rules for Impartial Determination of Union Fees are carefully crafted to accomplish this objective. More often than not, if relevant fact questions survive the arbitration process, relatively little money will depend upon their resolution in subsequent litigation.[9]

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[8] The plaintiffs do concede that in the Court's discretion, the findings of the arbitrator may be admissible in evidence.

[9] If there are factual issues to be resolved, it might be appropriate to refer them to the arbitrator as a special master.

For these reasons it is the opinion of the Court that it is desirable and consistent with developing case law to give as much deference to the arbitration award as is consistent with the mandate of § 1983.

Substantively, the issue to be determined in this suit is not, per se, the correct amount of the fee to be charged to the plaintiffs.

The legal issues to be decided involve the constitutionality of the unions' definitions of categories of chargeable activities and expenditures.

The factual issue to be decided, in the first instance at least, is whether the computations were made in a reasonable manner.

It is the opinion of the Court that it is not inconsistent with § 1983 to give great deference to the arbitrator's approval of accounting procedures followed by the unions in making their computations, especially when, as here, no evidence challenging the accounting procedures was offered at the arbitration proceeding.

Likewise, in the opinion of the Court, it is not inconsistent with § 1983 in ruling on a motion for summary judgment to give great deference to the fact-findings made by the arbitrator especially when, as here, no evidence inconsistent with the fact findings was offered at the arbitration proceedings.

III.

In their response to the defendants' motion for summary judgment the plaintiffs challenge the chargeability of expenses in four specific categories:

(1) Expenses incurred in connection with extra-unit litigation.

(2) Expenses for activities taken to protect and strengthen existing bargaining units.

(3) NEA expenditures for the National Foundation for the Improvement of Education.

(4) Certain administrative expenses.

The Supreme Court in *Lehnert v. Ferris Faculty Ass'n*, 111 S. Ct. 1950, 1959, 114 L. Ed. 2d 572, 589 (1991), ruled that the following guidelines are to be followed in making such determinations:

(1) such activities must be germane to collective-bargaining activity.

(2) charging such activities to dissenters must be justified by the government's vital policy interest in labor peace and avoiding "free riders," and

(3) charging such activities to dissenters must not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop.

A.

In *Lehnert v. Ferris Faculty Ass'n-MEA-NEA*, 643 F. Supp. 1306 (W.D. Mich. 1986), Judge Enslen, at 1325, ruled that litigation expenses were constitutionally chargeable regardless of whether the litigation involved members of service fee payer's bargaining unit if the litigation was related to the unit's duties as exclusive bargaining representative. The district court's decision was affirmed on appeal. *Lehnert v. Ferris Faculty Ass'n*, 881 F.2d 1388 (6th Cir. 1989). The circuit court opinion contains no specific reference to the extra unit litigation issue. The Supreme Court affirmed in part and reversed in part. *Lehnert*, 111 S. Ct. 1950, 114 L. Ed. 2d 572 (1991).

Justice Blackmun, writing for himself and four other justices including Justice Marshall, stated the general rule that a local bargaining representative may charge objecting employees for their *pro rata* share of the costs associated with otherwise chargeable activities of its state and national affiliate, even if those activities were not per-

formed for the direct benefit of the objecting employees' bargaining unit. *Id.* at 595. Justice Blackmun, however, recognized an exception that the general rule does not extend to the expenses of litigation that do not concern the dissenting employees' bargaining unit. In an opinion concurring in part and dissenting in part, Justice Marshall stated that Justice Blackmun's opinion concerning extra-unit litigation was no more than dicta. At the same time he made it clear that he would treat such costs as chargeable.

Three other justices concurred in whole or in part with an opinion authored by Justice Scalia. In one respect, Justice Scalia's opinion is not ambiguous. Justice Scalia rejected the Blackmun three-part test and would have allowed unions to compel contributions for dissenting employees only for the costs of performing the union's statutory duties as exclusive agent for a bargaining unit. It cannot be discerned with any degree of confidence how he and the justices who joined with him decided the extra-unit litigation cost issue, if indeed they did.

The Court agrees with Justice Heffernan, Chief Judge of the Wisconsin Supreme Court, who concluded that Justice Scalia did not directly address the issue and that there is no majority holding on this issue in *Lehnert. Browne v. Wisconsin Employment Relations Commission,* 485 N.W.2d 376, 388 (1992).

One aspect of Justice Scalia's opinion is not ambiguous. Justice Scalia rejected the majority's three-part test and would have allowed unions to compel contributions from dissenting employees only for the costs of performing the union's statutory duties as exclusive bargaining agent.

The Court presumes that if the Supreme Court has occasion to revisit the issue, the entire Court will follow the majority opinion in applying the three-part test rather than the minority statutory test. It is mere speculation how the extra-unit litigation issue might be resolved by a major-

ity of the Supreme Court applying the guidelines that are set forth in the majority opinion. To the extent that it was not reversed by the Supreme Court, the Sixth Circuit's opinion was affirmed.

The Court is bound by the Sixth Circuit opinion affirming Judge Enslen's opinion on this issue.

B.

The defendants classify as chargeable activities taken to protect and strengthen existing bargaining units, including actions relating to decertification petitions, unit clarifications and accretions.

The plaintiffs refer to these activities as "defensive organizing." This is a misnomer. The expenditures claimed do not include expenditures for recruiting new members or for organizing new bargaining units.

In *Lehnert*, 114 L. Ed. 2d at 592, the Court, quoting *Ellis v. Brotherhood of Railway Clerks*[10], stated that if a union is performing its statutory functions it must maintain its corporate or associational existence and must carry on its own affairs.

The identified actvities are essential to the unions' ability to bargain collectively for the benefit of all represented employees and clearly satisfy the first two parts of the three-part test articulated by Justice Blackmun in *Lehnert*. To the extent that a member of the bargaining unit may be ideologically opposed to the concept of collective bargaining in a closed or union shop, there is some burden in this kind of activity upon First Amendment values. On balance, it is the opinion of the Court that charging the dissenters with these activities will not significantly add to that burden.

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[10] 466 U.S. 435, 448 (1984).

C.

The defendants do not challenge the plaintiffs' allegation in their brief in opposition to the defendants' motion for summary judgment that "[t]he NEA considered its expenditures of $2,300,000 for the National Foundation for the Improvement of Education ("NFIE") as entirely chargeable."

The plaintiffs have submitted a document that reveals that during the year 1993 the NFIE administered two grant programs, the William G. Carr Grant Program which was established in 1967 and the Hilda Mehling Grant Program which was established in 1959. It appears to be undisputed that the NFIE is self-funded. It may be inferred that the funds for Carr grants are derived from dues. It may also be inferred that the NFIE has administered these grant programs and made awards from them in prior years. The Carr grants are up to $2,500 each. There is no evidence from which it can be inferred that either grant program made grants in any one fiscal year.

The document submitted by the plaintiffs provides that, with respect to both kinds of grants, "Only members of the National Education Association and educators from other countries, who are members of the WCOTP-affiliated educational organizations are eligible to apply." [11]

Clearly, as a matter of law, members-only benefits are not chargeable. It is the opinion of the Court that neither funds for grants for which nonmembers are not eligible nor expenditures for administering such grants are chargeable. The evidence, however, does not support a conclusion that if an appropriate part of the NFIE expenditure for the relevant school year was determined not to be chargeable, that the service fee each of the plaintiffs is required to pay would be reduced by a significant amount.

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[11] WCOTP stands for World Confederation of Organizations of the Teaching Profession.

In any event, this is a matter that could easily have been corrected by the arbitrator had someone brought the problem to his attention. The arbitrator could have required the union to provide data on the issue for the relevant school year and would likely have resolved the issue to the plaintiffs' satisfaction. This is a good example of the wisdom of the rule that courts may and should defer to the findings of the arbitrator.

D.

As a general rule the unions allocate a portion of administrative and overhead expenses as nonchargeable expenses. The plaintiffs challenge as illegal the fact that some administrative expenses which are referred to as expenditures incurred to ensure the satisfactory operation of the union's organization including administrative activities and expenditures for the operation of the organization are treated as fully chargeable. Specifically, the plaintiffs object to the fact that time spent by salaried officers and staff personnel dealing with staff problems, reviewing mail and paying bills and the like, as well as the entire cost of liability insurance premiums, fidelity bond premiums and building renovation (asbestos removal) were treated as fully chargeable. The arbitrator approved the allocation. It is not unreasonable to treat the challenged expenses as having been incurred to maintain the union's existence and to carry on its affairs.

IV.

On November 2, 1993, the day before oral argument was scheduled, the plaintiffs filed a supplemental affidavit challenging the manner in which UniServ grants and Unified Legal Services Program (ULSP) reimbursements were allocated. On November 22, 1993, with the Court's permission, the defendants filed a supplemental reply brief.

These grants and reimbursements involve disbursements from the NEA to the state affiliates including the MEA.

Accounting procedures involved in the allocations were modified for the 1991-92 school year.

The chargeability of most expenses incurred by the NEA is determinable through the NEA's records. The chargeability of Uniserv and ULSP disbursements must be determined by how the state affiliates use the grant money.

Beginning in 1991-92, the NEA began to use only the specific state's chargeable percentages for the Uniserv and ULSP grants to determine the agency fee it charged objecting fee payers in that state. For audit reporting purposes, the NEA uses adjustments of the average chargeable percentages of Uniserv grants and ULSP reimbursements from the previous fiscal year because the NEA audit is performed before all state affiliates have completed their chargeable allocations for the fiscal year. At each state's arbitration, the current figures for that state are used.

As a matter of law, this is a reasonable procedure.

The plaintiffs complain about the accounting procedures used in making allocations in other respects. However, " '[a]bsolute precision in the calculation [of the fee] is not . . . to be expected or required; we are mindful of the difficult accounting problems that may arise.' " *Abood v. Detroit Board of Education*, 431 U.S. at 239 n.40, *quoting Allen*, 373 U.S. at 122. The attacks by the plaintiffs upon the accounting procedures used by the defendants do not create a genuine issue of material fact for trial.

Conclusion

In drawing the conclusion that the record does not disclose the existence of genuine issues of material fact, the Court has granted some deference to the award of the arbitrator. Had some of the issues raised by the defendants been brought to the arbitrator's attention, it is not unlikely that the arbitrator would have required the

unions to provide some additional records. It is possible that he would have modified the unions' calculations in some respects. In all probability, the adjustment would have been minimal.[12]

An order will be entered granting the defendants' motion for summary judgment. The plaintiffs' motion for class certification is moot.

In due course, a judgment for the defendants will be entered. Because of the nature of the proceedings, no costs shall be allowed.

James P. Churchill
JAMES P. CHURCHILL
United States District Judge

[12] The MEA service fee reflects a $2.00 deduction to make allowance for potential disputes.

APPENDIX C

AMERICAN ARBITRATION ASSOCIATION
VOLUNTARY LABOR ARBITRATION TRIBUNAL

Case No. 54 673 0001 92
Impartial Determination of Agency Fees

In the Matter of the Arbitration Involving MICHIGAN EDUCATION ASSOCIATION, NATIONAL EDUCATION ASSOCIATION, CENTRAL MICHIGAN UNIVERSITY, FACULTY ASSOCIATION, FERRIS FACULTY ASSOCIATION, GROSSE POINTE EDUCATION ASSOCIATION, GROSSE POINTE OFFICE PERSONNEL ASSOCIATION, LANSING SCHOOLS EDUCATION ASSOCIATION, MENDON EDUCATION ASSOCIATION and TRAVERSE CITY EDUCATION ASSOCIATION

ARBITRATION OPINION AND AWARDS

This arbitration has been conducted pursuant to the "Policy Regarding Objections to Political-Ideological Expenditures" adopted by the Michigan Education Association (MEA) and the American Arbitration Association Rules for Impartial Determination of Union Fees. These rules require a union which charges non members an agency fee to meet many procedural requirements. One requirement is a review of the fee by an impartial decision maker. Pursuant to this requirement hearings were held on this matter on March 18, 19 and 23, 1992. Subsequently, post-hearing briefs were filed on behalf of the National Education Association (NEA) and the MEA on April 3, 1992. There were no post-hearing briefs filed by

challengers but some of them had made a summary of their objections on the record. The transcript of the hearings was made available for a review at the AAA offices for several days and then the record was closed on April 4, 1992.

In the arbitrator's opinion these hearings provided a full and fair exposition of the service fee charged by the unions involved here. The arbitrator and the union took pains to provide evidentary and procedural safeguards. All parties were afforded a reasonably good opportunity to be heard and these expeditious proceedings have allowed for a prompt decision by the arbitrator. All of this is consistent with the standards set in the governing court decisions.

The purpose of these hearings is to determine the appropriateness of the calculations of the service fees charged to certain bargaining unit members who have elected not to join the National Education Association (NEA), the Michigan Education Association (MEA) and seven of its local affiliates. Two hundred thirty-six members have filed a timely objection to the Association's reduced service fee for the 1991-92 school year. Three objectors attended the hearings and they questioned witnesses and made their views known to the arbitrator.

This is the fourth AAA administered agency fee arbitration in the State of Michigan which has involved NEA/MEA and its affiliates under the current, court-approved service fee collection procedures. In the previous proceedings arbitrators have reviewed in detail the methods, procedures and the calculations employed to set NEA/MEA and affiliate agency fees for objecting non members. The foundation for such review must be the underlying legal authority. This is particularly true in 1992 when we have the guidance of the Supreme Court's most recent decision on this subject in *Lehnert v. Ferris Faculty Association*, 111 S. Ct. 1950 (1991)).

LEGAL OVERVIEW

The U.S. Supreme Court has interpreted the Railway Labor Act on several occasions to give guidelines on what may be chargeable expenditures for an agency fee determination. (*Railway Employees v. Hanson*, 367 US 740 (1961)). However, the test set forth below is the most explicit

> "[T]he test must be whether the challenge expenditures were necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues. Under this standard, objecting employees may be compelled to pay their fair share of not only the direct costs of negotiating and administering a collective bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit."
>
> (*Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*, 466 U.S. 435 (1984)).

The State of Michigan has authorized public employee unions to negotiate agency shop agreements into the collective bargaining agreements which they negotiate with public employers. The Public Employment Relations Act (PERA) expressly provides that the payment of a service fee to the exclusive bargaining agent may be a condition of employment for public employees. The law also states that ". . . all employees in the bargaining unit shall share fairly in the financial support of their exclusive bargaining representative . . ." (MCL 423.210). Michigan's Supreme Court rejected challenges to this statute (*Detroit Bd. of Ed. v. Parks*, 417 Mich 268 (1983)). The U.S. Supreme Court reviewed this decision and it also considered the Michigan statute. The non-member fee payers had

asserted that their constitutional rights under the First and Fourteenth amendment had been violated. The U.S. Supreme Court opined:

> "To be required to help finance the union as a collective bargaining agent might well be thought, therefore, to interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit. But the judgment clearly made . . . is that such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress. The furtherance of the common cause leaves some leeway for the leadership of the group. As long as they act to promote the cause which justifies bringing the group together, the individual cannot withdraw his financial support merely because he disagrees with the group's strategy.
>
> (*Abood v. Detroit Board of Education*, 431 U.S. 209 (1977))

In a 1986 opinion the Supreme Court of the United States went further in setting forth the constitutional requirements for the collection of agency fees. The court required that certain procedural steps be taken before the service fee could be collected from non-members. (*Chicago Teachers Union v. Hudson*, 475 U.S. 292). These requirements included an adequate explanation to the objector of the basis for the service fee. The court also required that there be an opportunity provided to the non-member to challenge the amount of the service charge in a hearing before a neutral arbitrator. The disputed amount of fees collected was to be held in escrow until the challenge against that amount of the fee was resolved. It was this decision whch lead the NEA and the MEA to formulate and implement their current procedures relating to service fee charges. Similarly, this decision was the impetus for

the American Arbitration Association to promulgate a procedure and to provide a system for the reasonably promptly selection of impartial decision makers and their issuance of expeditious awards.

The service fee collection system procedure revised in the MEA was approved in federal district court prior to its implementation. In *Lehnert v. Ferris Faculty,* 707 F. Supp. 1490 (W.D. Mich., 1989) the court gave meticulous attention to the details of the MEA service fee procedures and its compliance to the Supreme Court's constitutional standards. This decision was unanimously affirmed by the U.S. Court of Appeals for the Sixth Circuit (893 F2d 111 (6th Cir, 1989)).

In summary, the federal and state case law provide that "chargeable activities" must be germane to unit bargaining activities and justified under the long standing national policy which favors labor peace and disfavors "free riders". All of this is to be accomplished by a union in a manner which does not significantly burden the free speech rights of the non members. Further, the governing decisions have upheld the process of comparing the union's total expenses to the non-chargeable expenditures to determine an appropriate pro rata share. The burden of showing the appropriateness of the expenditures upon which the service fee is based is on the union. Finally, the union's expenses for ideological and political purposes and the union's organizing costs may not be charged to those who pay the service fee. (*Tierney v. City of Toledo,* 824 F2d 1497 (6th Cir, 1987)).

The Supreme Court has recognized that a public employee labor union engages in chargeable activities which cover a broad range. The majority in the *Lehnert* decision recognized that the expenditures of a parent organization (i.e. the national organization with which the certified bargaining agent is affiliated) do not have to be undertaken directly on behalf of its many underlying bargaining units. So the national or state-wide union

need not demonstrate a direct impact in its activities on the dissenting employee's unit. This case continued the previously cited case law in holding that in the public sector a union's chargeable expenditures may include contract administration, dispute resolution, collective bargaining, and many other operational costs which are not carried on for ideological and/or political purposes. A union magazine or newspaper was held to be a proper chargeable expenditure for all employees except that the union had to exclude the costs for that portion of the publication which was political or which espoused a nonchargeable ideological theme.

The federal court has already ruled that the standard NEA/MEA *Hudson* packet of information properly informs the objecting members of the bargaining units of affiliates. This packet includes an explanation of the calculation of the MEA service fee, a copy of the MEA's "Policies and Procedures Regarding Objections to Political and Ideological Expenditures", an explanation of the current MEA Reduced Service Fee Table and the prior years Audited Financial Statement for the Michigan Education Association. In each packet there is also similar information provided for the NEA and for the local affiliates. It has been held that the expenditures of the preceding year are a proper foundation for the segregation of the current expenditures. Also the MEA approach has been determined to fairly summarize the process used in calculating the service fee and it adequately explains the categories of chargeable and nonchargeable expenses set up by the MEA. (*Jibson v. NEA/MEA*, 719 F Supp 603 (W.D. Mich, 1989)).

A five member majority of the U.S. Supreme Court more narrowly limited the chargeability of certain union expenditures in the *Lehnert* case. The Court ruled that dissenting employees may not be charged for ". . . lobbying activities that do not concern legislative ratification of, or fiscal appropriations for, their collective bargaining agreement." The *Lehnert* decision also stated that in-

cluded in prohibited legislative lobbying activities are those related to ". . . financial support of the employees profession or to public employees generally". The court explained that the basis for this exclusion was to protect the First Amendment interests of the objecting employees. Thus, even the union's expenditures for public relations programs to enhance the reputation of the teaching profession in general were held to be non-chargeable. (Id at 1964).

Another area of limitation on chargeable union expenditures expressed in the *Lehnert* decision was litigation expenses. The *majority* of the Court concluded that litigation expenses which were shown to be reasonably necessary to the effective performance of the union's statutory duties were chargeable. Justice Blackman had sought to carve out the cost of litigation beyond the dissenting employee's bargaining unit but Justices Marshall and Scalia did not concur in that limitation. Therefore, there is a clear majority on the court which allowed expenditures to be charged across bargaining unit lines if the litigation involved is a normal incident of the duties associates with those of the exclusive bargaining agent (Id at 1982)).

This legal overview is somewhat redundant to similar reviews provided by arbitrators in past years. However, it is necessary that each separate determination set forth the legal precedents and standards which have guided each arbitrator and to explain the parameters and criteria which have been the foundation for the determinations made by each neutral decision-maker.

STATEMENT OF FACTS:

The National Education Association (NEA) is an international labor union which operates through a system of affiliated state (53) and local unions (13,000) which provide services and benefits to more than two million members and fee-payers. The Michigan Education As-

sociation (MEA) is one of the NEA's state level labor unions which has approximately 1,000 local affiliates. The MEA represents approximately 109,000 employees of Michigan schools and colleges.

The NEA, MEA and their affiliates have a "unified structure", which means that joining a local union automatically entails membership in the state and the national organization and membership dues responsibility at all three levels. Therefore, non members objecting to the payment of dues on ideological or political grounds are obligated to pay separate service fees to the local, state and national union organizations. However, only the local affiliates indicated above have submitted their expenditures for independent audit so that they may assess a service fee against objecting non members. There were several who had objecting non-members which elected not to have the audit performed. Those affiliates have not assessed service fees and only the agency fees computed by the NEA and the MEA have been challenged by objecting non members represented by those local unions.

OBJECTIONS OF NON MEMBERS:

In the 1992 hearings no written objections were submitted to the arbitrator. Only three of the two hundred thirty-six individuals who had filed timely objections appeared at the arbitration hearings. Most of the comments of these observers were in the form of questions posed to the witnesses. For example, there was concern expressed that the NEA had not reexamined its policies about chargeable expenditures following the *Lehnert* decision. The NEA assured the questioner that there were less chargeable association costs following that 1991 Supreme Court decision. It was also noted that both the MEA and the NEA had changed their guidelines for chargeable costs in 1991.

There also was a question about how the NEA political action committee (PAC) is funded. The response was

that the NEA-PAC is a separate entity and that any costs or expenditures by any NEA staff connected with this PAC is in a separate account and no dues dollars go to support this operation. It was added that the entire expenditures for the NEA Government Relations Department are treated as non-chargeable. The objectors were also assured that the audit of MEA/NEA/local affiliate reports by a certified public accountant is truly independent and it is accomplished by standard accounting principles and methods.

Some objectors challenged the actual cost to negotiate a labor agreement every three years. One non member estimated that dues and service fees would generate $500,000 or so in a three year period in his 600 person bargaining unit. He assessed that it was "living high off the hog" to spend that sum of money to bargain and administer a labor agreement in a relatively non-confrontive setting. The association witnesses pointed out that services to his unit are offered on three levels, national, state and local, and that all of these activities can benefit his unit and they all must be funded.

Finally an objector pointed out that he cannot vote on the question of ratifying a negotiated master agreement. He asserted that if he is barred from such a vote because he is not an association member then he should not be charged for the cost of such elections. The association witnesses answered that the ratification of a tentative agreement is germane to the collective bargaining process and thus such costs are properly charged to the agency fee payers.

The arbitrator has considered the objections shown above and other comments made by non members present at the hearings. The unions in this proceeding convinced the arbitrator that they had properly excluded all expenditures for political and ideological activities. Further, he concluded that each chargeable category of expenses consisted of either a direct collective bargaining activity

or an activity which is germane to the duties of an exclusive representative of all the employees in the NEA/MEA bargaining units.

THE NEA SERVICE FEE:

The NEA dues are established annually at the Representative Assembly, the primary policy-making body for that organization. This assembly of more than 8600 delegates determines the next year's program and budget and then it sets the amount of the successor year dues in accordance with the NEA constitution and bylaws. The dues and service fees are subsequently assessed and collected and placed in the NEA general fund. These monies are used to finance the fifteen administrative areas established in the budget, i.e. Membership and Affiliates, Collective Bargaining and Compensation, Communications, Education and Labor Organizations, Government Relations, Human and Civil Rights, Instruction and Professional Development, Legal Services, the National Center for Innovation, Publishing, Research, Administration, Business and Finance, Data Processing and Governance. These areas are further broken down into specific programs. The expenditures for each of these programs are then monitored throughout the year by a system of forms and coding. The data is then summarized and reviewed in detail. Then, through a system first established by Arbitrator Arvid Anderson, the expenditures are segregated according to whether each may be appropriately charged to service fee payers.

The NEA provides individual advice and detailed guidelines to its programmatic staff and administrative leadership to secure adherence to the judicial standards for segregating expenditures. The following activities and expenditures are shown to be chargeable in the NEA guidelines:

1) collective bargaining;

2) preparations for strikes, and activities undertaken in connection with lawful strikes;

3) contract administration;

4) grievance processing, including arbitration;

5) specific terms and conditions of employment, such as wages, hours, benefits, employment discrimination, tenure, pensions/retirement, social security, teacher evaluation, unemployment compensation, overtime and minimum wages, environmental issues in the workplace, etc.;

6) maintenance of existing membership and recognition rights, including defense against challenges from other unions;

7) professional development (including teacher education, continuing education, certification and licensure), curriculum development and implementation, teaching methods and other instructional skills, site-based decisionmaking, and education generally, except to the extent that these activities and expenditures involve legislative lobbying and other political activities and external public relations;

8) unemployment and job opportunities in education;

9) insurance programs and other benefits for which members and feepayers are eligible;

10) NEA award programs;

11) Association leadership and management skills training and techniques, strategic planning;

12) NEA Representative Assembly, Board of Directors and Executive Committee; and

13) employee relations and NEA staff grievances."

Similarly, the non-chargeable expenditures and activities were shown as follows in the NEA material:

1) lobbying and political efforts before state legislatures, Congress, federal agencies, or other executive branch officials, and ballot initiatives, unless specifically related to ratification or implementation of a collective bargaining agreement;

2) external public relations unless specifically related to collective bargaining or contract administration;

3) litigation unless specifically related to collective bargaining, contract administration or organizational maintenance;

4) voter registration, get-out-the-vote, and campaign techniques (i.e., training programs designed to prepare leaders, staff and/or members to work in support of candidates for any public office);

5) supporting or contributing to charitable, religious or ideological causes (e.g., direct contributions to such causes, expenditures designed primarily to assist such causes, and payments to fundraisers for groups which promote such causes);

6) supporting or contributing to political organizations or candidates for public office (e.g., activities in connection with the endorsement or other support of political candidates, activities in connection with NEA-PAC, including its administration, consulting with/or providing training for state/local political action committees);

7) publications, portions of publications or any other communications which involve nonchargeable issues, such as those related to activities or expenditures listed herein as nonchargeable;

8) organizing or recruiting new members or establishing new or expanded bargaining units, as opposed to "organizational maintenance" (i.e.,

attempting to maintain current membership and bargaining units);

9) reproductive freedom (including abortion and birth control), gun control, anti-flag burning laws, balanced budget amendment, juvenile delinquency prevention and control, line item veto, prayer in school, South African apartheid, energy conservation, youth employment, civil/human rights issues (to the extent they do not affect collective bargaining, contract administration or organizational maintenance), international relations, nuclear arms freeze, environmental protection measures except to the extent they affect the working conditions of members/feepayers (including the safety of schools) child care, child support enforcement, judicial or executive appointments, dropout prevention unless it is directly related to handling dropouts in the classroom or school environment, etc.;

10) illegal job actions and administration of the National Education Employees Assistance Fund;

11) monitoring, etc., activities of groups and individuals whose purpose is to undermine public education, to the extent those activities are unrelated to chargeable issues such as collective bargaining, professional development, and organizational maintenance, etc.; and

12) members-only benefits."

The directors of the seven programatic administrative areas in the NEA organization provided a summary of their chargeable expenditures. These figures were reviewed by the in-house attorney and the accuracy of the reports were verified by an independent auditor. The arbitrator will now consider the activities and expenditures in each of the programatic areas and review the chargeable/non-chargeable determinations made therein.

1) MEMBERSHIP AND AFFILIATES:

NEA provides assistance and training to its affiliates in this programatic administrative area. The subjects covered in these programs are collective bargaining, contract administration, grievance processing, arbitration, new unit organizating, recruiting members, maintaining membership levels and improving the overall performance of affiliates. This is the area where staff is responsible for delivering NEA services to members and others represented across the nation by the NEA affiliates. These services are provided by staff in six regional offices. Additionally, the NEA funds 30% of the salary and fringe benefits for the state level staff members (Uniserv Directors).

In general, the NEA included expenditures to educate and maintain existing members and it excluded expenditures for recruiting and organizing new members. Also shown as chargeable were training expenditures for improving affiliate programs and the delivery of services while training regarding organizing new units and enrolling new members was shown as non-chargeable. The NEA also included expenditures for maintaining executive management services, women's and minority leadership training but excluded activities and materials pertaining to political or legislative matters.

Function	Chargeable	Nonchargeable	Total
Membership Promotion & Recruitment	$2,703,012	$1,691,503	$4,394,515
Leadership Training	1,574,914	148,639	1,723,553
Staff Training	2,290,226	327,287	2,617,513
Coordination of Services to Affiliates	5,352,507	334,935	5,687,442
Bargaining, Member Welfare & Crisis Support	397,391	183,582	580,973
Organizational Maintenance	3,784,795	4,430,088	8,214,883
UniServ	26,348,086	3,556,905	29,904,991
	$42,450,931	$10,672,939	$53,123,870

2) COLLECTIVE BARGAINING AND COMPENSATION:

All NEA program activities related to collective bargaining and compensation for employees in the field of education are included in this programatic administrative area. The personnel in this division work on state bargaining statutes, public employee relations commissions, bargaining strategies and the establishment of collective bargaining through de facto bargaining. The NEA plans, implements and evaluates the program activities described above and it also addresses other related issues such as indirect and direct compensation, job security, and related topics.

The NEA determined that some funding, staff and technical assistance provided for legislative activities and/or lobbying was non-chargeable but those expenditures which were designed to improve the compensation of employees represented by the Association were chargeable. Summary: Chargeable $1,192,861; Non-chargeable $124,496; Total —$1,317,357.

3) COMMUNICATIONS:

The staff in this area produces press releases, advertisements, public service statements, and information packets for the Association leadership and for the general public. The programs here also provide media relations assistance for the affiliates. The NEA decided that the entire expenditures in this programatic area are non-chargeable since all of these funds went to activities intended to strengthen the public's perception of the field of education in general and the Association in particular:

Chargeable	$ -0-
Non-chargeable	$7,022,328
Total	$7,022,328

4) GOVERNMENT RELATIONS:

This area has staff who have the primary responsibility for legislation pending before the Congress of the United States. There are also personnel who seek to influence the executive branch as it implements legislation or it develops proposals for new laws. The NEA has treated the expenditures in this area as being non-chargeable to all objecting fee payers.

Function	Chargeable	Nonchargeable	Total
Congressional Relations	$ -0-	$1,464,991	$1,464,991
Intergovernmental Relations	-0-	634,713	734,713
Education & Information	-0-	858,367	858,367
Political Action	-0-	5,576,872	5,576,872
	$ -0-	$8,534,943	$8,534,943

5) HUMAN AND CIVIL RIGHTS:

There are two main thrusts in this programatic area. First, there is an effort to increase the number of women and minority individuals who hold NEA leadership posts. The NEA also monitors programs relating to pay equity, academic freedom and employment discrimination in education.

The NEA included leadership training on matters that have been previously determined to be chargeable and they excluded the costs for public relations and membership recruitment activities which were a part of these programs. Activities which related to bargaining or achieving equal educational access for minorities were deemed chargeable while matters which did not affect the terms and conditions of employment of education employees were held to be non chargeable.

Function	Chargeable	Nonchargeable	Total
Leadership Programs	$1,454,722	$43,493	$1,498,215
Equal Access	1,074,302	317,969	1,392,271
Equity Program	903,973	49,775	953,748
Preserving Public Schools & Education	172,986	131,248	304,234
Protection of Civil Rights	324,232	273,742	597,974
Total:	$3,930,215	$816,227	$4,746,442

6) INSTRUCTION AND PROFESSIONAL DEVELOPMENT:

The staff in this programatic administrative area work with affiliates to insure that professional development and evaluation (including teacher certification) are strengthened. In this area the NEA seeks to provide assistance to state and local affiliates in curriculum development, textbook selection, teaching methods, etc.

The NEA determined that the costs of testimony before Congress or assistance to affiliates in lobbying efforts would be excluded here while expenditures that concern teaching and education generally would be treated as chargeable. Conferences on restructuring schools and discussing professional growth and new roles for teachers were counted as chargeable expenses and the costs of analyzing legislation were excluded in the determinations.

Function	Chargeable	Nonchargeable	Total
Standards, Self-Governance and Compensation	$1,562,006	$280,846	$1,842,852
Association Leadership on Education Reform	2,208,741	34,665	2,243,406
Total:	$3,770,747	$315,511	$4,086,258

7) LEGAL SERVICES PROGRAMS:

NEA members and agency feepayers are provided with comprehensive legal protection under these programs. Also association officers and staff are protected from financial

liability if they are sued for performing authorized Association work.

The NEA determined that the costs of the personal financial liability protection program were non-chargeable since this program is not available to feepayers in Michigan. However, the insurance program which provided protection for the association officers and staff was held to be chargeable since these were costs necessary to carrying out the business of the Association. Finally, the expenditures for the lost-cost attorney referral program was determined to be non-chargeable because this is a program which the MEA does not offer to its feepayers.

Chargeable:	$6,773,479
Nonchargeable:	$10,400,649
Total:	$17,174,128

8) PUBLISHING:

Through various publications the NEA communicates with its members, feepayers, leaders and staff about its programs, policies, services and achievements. Publications such as *NEA Now, NEA Today, Higher Ed. Advocate*, etc. were evaluated page by page and article by article and the text of all non-chargeable topics were measured in relation to the total publication and prorata costs were excluded.

Chargeable:	$6,130,941
Nonchargeable:	$1,401,878
Total:	$7,532,819

9) RESEARCH:

State and local affiliates use information and survey data provided by the NEA research staff. The affiliates use this material in collective bargaining, compensation systems, school finance issues and other education-oriented topics. The data processing area also provides computer

software on these topics which can be adopted by association bargainers and officers.

The NEA determined that workshops, health care and compensation data, collective bargaining strategies, etc. were chargeable activities in that they related to the fee-payer's working conditions but they excluded costs for organizing surveys, data about new units, political action surveys, and new member recruitment.

Function	Chargeable	Nonchargeable	Total
Compensation and Collective Bargaining Systems and Services	$ 883,872	$ 90,967	$974,839
School Finance	718,656	30,969	749,625
Surveys	1,639,226	207,481	1,846,707
Data Systems and Services	2,221,403	34,476	2,255,879
	$5,463,157	$363,893	$5,827,050

Summary of Programmatic Administrative Areas

Administrative Area	Chargeable	Nonchargeable	Total
Membership and Affiliates	$42,450,931	$10,672,939	$53,123,870
Collective Bargaining & Compensation	1,192,861	124,496	1,317,357
Communications	-0-	7,022,328	7,022,328
Government Relations	-0-	8,534,943	8,534,943
Human & Civil Rights	3,930,215	816,227	4,746,442
Instruction & Professional Development	3,770,747	315,511	4,086,258
Legal Services	6,773,479	10,400,649	17,174,128
Publishing	6,130,941	1,401,878	7,532,819
Research	5,463,157	363,893	5,827,050
Total Program Area Chargeable Audited Expenditures			$69,712,331
Total Program Area Nonchargeable Audited Expenditures			$39,652,864
Total Program Area Audited Expenditures			$109,365,195
Program Area Chargeable Percentage			63.74%
Program Area Nonchargeable Percentage			36.26%

10) ADMINISTRATION, SUPPORT AND OVERHEAD AREAS

The four NEA administrative areas are administration, business and finance, data processing and governance. The NEA determined those expenditures which were chargeable by: 1) counting all undisputable expenses for collective bargaining and personnel matters; 2) where there were clearly defined nonchargeable expenses they were excluded; 3) the remaining amounts in each area was multiplied by the program area chargeable percentage; 4) the product of step three was added to the amount identified in step 1 to derive the total amount chargeable to NEA fee payers. This process is founded on the original procedure established by Arvid Anderson.

Summary of Support/Overhead Administrative Areas

Administrative Area	Chargeable	Nonchargeable	Total
Administration	$10,288,667	$2,107,381	$12,396,048
Business and Finance	3,478,030	2,231,527	5,709,557
Data Processing	3,180,495	1,809,299	4,989,794
Governance	8,327,102	2,356,981	10,684,083
Total Support Area Chargeable Audited Expenditures			$25,274,294
Total Support Area Nonchargeable Audited Expenditures			$ 8,505,188
Total Support Area Audited Expenditures			$33,779,482

Predicated on all of this data the NEA reached the following conclusions:

Total chargeable Audited Expenditures	$100,786,625
Total Nonchargeable Audited Expenditures	$ 48,158,052
Total Audited Expenditures	$148,944,677
Final Chargeable Percentage	67.67%
Final Nonchargeable Percentage	32.33%

AWARD:

Each objecting feepayer is required to pay to the National Education Association the amount of $62.26 for the 1991-92 year. This figure is 67.67% of the $92.00 dues paid by NEA members.

THE MEA SERVICE FEE:

The MEA has approximately 1,000 local affiliates and it represents approximately 109,000 Michigan education employees. The MEA has offered testimony and exhibits in support of the service fees which has been charged to certain of its bargaining unit members who have declined association membership and who have objected to that fee. The MEA procedures, methodology and calculations will now be reviewed to determine if all are in conformity with current legal standards.

Predicated on the majority holdings in the *Lehnert* decision the MEA has determined all lobbying and all related political activity to be nonchargeable. Additionally, the MEA has changed its approach in charging for litigation expenditures and it currently has included only traditional labor union litigation as chargeable. Thus, legal matters involving contract administration, collective bargaining, tenure rights disputes, etc. are included litigation costs while the MEA has excluded expenditures for litigation involving new unit organizing issues, unlawful job action issues and other non-chargeable issues.

The MEA has reflected a single uniform service fee for all fee payers in the state. This fee represents a pro-rata share of the MEA's chargeable costs and this is unrelated to whatever bargaining unit the fee payer is in. This practice has been approved in federal court decision generally and the MEA procedure has had specific court approval in *Lehnert*.

The MEA utilizes a list of chargeable and non-chargeable activities and expenditures which is very similar to the list employed by the NEA (see Appendix "A"). Based on these lists all MEA expenditures are segregated as follows:

> "With the exception of overhead expenditures, all expenditures incurred by the MEA have been classified into different categories of chargeable or non-

chargeable activities. Every effort was made to classify chargeable expenditures when made into a major category of chargeable activity by the employee responsible for that expenditure. MEA professional staff members are required to identify and categorize their time into major categories of chargeable and nonchargeable activities. By entering expenditures into the MEA accounting system in this manner, the MEA is able to determine the percentage of the MEA's expenditures which are made in different major categories of chargeable activities and nonchargeable activities. Overhead expenditures were treated as chargeable only in the same ratio that chargeable expenditures relate to the total of chargeable and nonchargeable expenditures.

Using these criteria, the MEA determined the service fee chargeable to objecting non-members and then, in accordance with its procedures, reduced that amount by an additional $2.00 to make allowance for disputed chargeable costs.

The various fee amounts indicated on the service fee election form (Section E) have been appropriately adjusted for service fee payers who work less than full time and for educational support personnel."

(from MEA *Hudson* packet)

The MEA's treatment of the costs of its governing body, the Representative Assembly, has already been approved in the *Lehnert* decision. The remaining chargeable activities shown above are non-controversial. They have been reviewed and approved in three pre-*Lehnert* arbitration awards and so there can be little dispute now about the appropriateness of charging fee payers for these costs. This arbitrator finds all of the chargeable costs presented by the MEA to be consistent with the court decisions and their internal guidelines.

The procedures and methodology used by the MEA supported the accuracy of the reduced service fee for

agency shop fee payers. The categorization of expenditures by staff members has been described generally above. More specifically, the daily time records had shown chargeable and nonchargeable time and costs and this information was inputed into the computer accounting system. The MEA then calculated the percentage of staff time spent on chargeable activities and it used this percentage to proportionately allocate MEA salary and fringe benefit costs and also travel costs to the service fee. The MEA also included the net cost of all chargeable professional conferences and the prorata space charge for the MEA *The Voice* publication in the service fee expenditures. All direct cash disbursements were reviewed and all nonchargeable outlays were excluded from the agency fee calculations. Finally, the overhead expenses were allocated as chargeable or nonchargeable based on the ratio of all other MEA expenditures for the year.

The arbitrator notes that the MEA reviewed its categorization of expenditures following the issuance of the *Lehnert* decision in May 1991. Many of the former standards and criteria for service fee charges were unchanged. However, the MEA was very conservative in what it included as chargeable litigation costs or the expenditures for leadership assistance grants. This segregation of costs was done by division and this resulted in the following computation:

Divisions	Major chargeable expenditures 1	2	3	Total chargeable	Non-chargeable expenditures	Total
Direct expenditures:						
Program development and support	$ 60,605	$ 385,113	$ 2,279,486	$ 2,725,204	$2,017,324	$ 4,742,528
Uniserv	5,329,881	4,349,195	7,466,610	17,145,686	2,493,386	19,639,072
Program services	654,064	1,970,740	1,183,779	3,808,583	1,418,924	5,227,507
General and administrative	(164,972)	(140,765)	(212,363)	(518,100)	(106,162)	(624,262)
Less NEA expense reimbursements	618,252	775,622	970,352	2,364,226	708,951	3,073,177
Subtotal	5,261,326	5,788,661	9,747,160	20,797,147	5,114,521	25,911,668
Percentages	20.30%	22.34%	37.62%	80.26%	19.74%	100.0%
Overhead	1,037,607	1,141,879	1,922,896	4,102,382	1,008,983	5,111,365
Less NEA expense reimbursements	7,734	8,511	14,332	30,577	7,520	38,097
Total	$6,291,199	$6,922,029	$11,655,724	$24,868,952	$6,115,984	$30,984,936
Percentages				80.26%	19.74%	100.0%

(Fiscal year 9/1/90 to 8/31/91)

The 1990-91 MEA dues were $356.30 and when this is multiplied by the chargeable expense percentage of 80.26% the reduced service fee of $285.97 is the product. The MEA has then deducted an additional $2.00 which is done to make an allowance for potential disputed chargeable costs as defined in the MEA policy entitled "Objections to Political-Ideological Expenditures". The resulting reduced fee charge for the 1990-91 year is $283.97.

The MEA submitted its reduced service fee table to a certified public accountant for an examination pursuant to the attestation standards of the American Institute of Certified Public Accountants. This accountant issued an unqualified opinion that the MEA had properly accounted for its expenditures in the designated chargeable and nonchargeable categories listed in the *Hudson* packet sent to non members of the Association. Thus, the arbitrator is assured that the reduced service fee table is consistent with and it reconciles to the MEA's audited financial statement and it also reconciles with the MEA's breakdown of each division's expenditures.

Based upon the facts presented above this arbitrator was convinced that the MEA properly distributed its expenditures in chargeable and nonchargeable categories and that it then allowed a sufficient cushion for possible error. He is also satisfied that the calculations of the service fee were done properly and that the resulting reduced charge is an accurate reflection of expenditures reasonably incurred by the MEA to carry out its function as the exclusive representative for all members of its bargaining units.

AWARD:

Each nonmember objector is required to pay to the Michigan Education Association the amount of $283.97.

THE LOCAL AFFILIATES SERVICE FEE:

There were seven local affiliates which required a service fee from nonmembers and which participated in these agency fee proceedings. Each local submitted their financial records to a CPA and each of their service fee calculations was then examined in an independent audit. The CPA's report and the record in this hearing generally supported the service fee calculations of the local affiliates.

The MEA had required several adjustments and reconciliations before a final financial statement for the local affiliates had been issued for agency fee purposes. These organizations are often very small and they operate on a cash basis. Most of their expenditures go to rent, phone bills, staff salaries, etc. and there can be little debate that such direct and overhead costs are for traditional union activities which also serve the fee paying non members. This arbitrator's review of each affiliates expenditures supports their allocation of chargeable and nonchargeable costs. The attestation examination of the local affiliates service fee calculations provides a further level of assurance that these fees are reasonable and appropriate. (see *Gwirtz v. Ohio Education Association*, 887 F2d 678 (6th Cir, 1989)).

For all of the reasons stated above the arbitrator finds that the reduced service fee chargeable to nonmembers for the local affiliate associations is as follows:

Central Michigan Faculty Assn.	82.42%
Ferris Faculty Assn.	97.30%
Grosse Pointe Ed. Assn.	95.96%
Grosse Pointe Office Personnel Assn.	92.10%
Lansing Schools Ed. Assn.	77.76%
Mendon Ed. Assn.	33.84%
Traverse City Ed. Assn.	67.51%

AWARD:

Each nonmember objector in a local affiliate association listed below is required to pay the following agency fees for 1991-92:

CMUFA	$32.97
FFA	$36.97
GPEA	$197.22
GPOPA	$27.63
LSEA	$56.92
Mendon	$ 8.46
TCEA	$59.88

Dated: April 16, 1992

/s/ Barry C. Brown
BARRY C. BROWN
Arbitrator

APPENDIX D

[Filed Jun. 17, 1996]

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 94-1164/1210

ROBERT G. BROMLEY, *et al.*,
Plaintiffs-Appellants,

v.

MICHIGAN EDUCATION ASSOCIATION-NEA, *et al.*,
Defendants-Appellees.

ORDER

BEFORE: NELSON and DAUGHTREY, Circuit Judges; and HILLMAN,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
LEONARD GREEN
Clerk

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* Hon. Douglas W. Hillman, Senior United States District Judge for the Western District of Michigan, sitting by designation.

No. 96-429

Supreme Court, U.S.
FILED
NOV 20 1996
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

MICHIGAN EDUCATION ASSOCIATION-NEA, *et al.*,

Petitioners,

v.

ROBERT G. BROMLEY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTION PRESENTED

On a motion for summary judgment in an action under 42 U.S.C. § 1983 (1988) challenging the constitutionality of a union's calculation of an "agency fee," can the court deny the nonunion public employees discovery of the facts underlying that calculation, which are solely in the union's possession, and give great deference to prior findings of fact and approval of the union's accounting practices by an "impartial decisionmaker" under a procedure established by the union, where:

- the nonmembers had no role in selecting the "impartial decisionmaker";

- the decisionmaker has not been shown to possess any special competence in First-Amendment law;

- the record of the prior proceedings consists of summary documents and self-serving, hearsay testimony of union agents, admitted because the rules of evidence did not apply; and,

- the nonmembers were not entitled to discovery and compulsory process as a matter of right in those proceedings?

TABLE OF CONTENTS

Page

COUNTERSTATEMENT OF QUESTION PRESENTED . i

TABLE OF AUTHORITIES iv

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

COUNTERSTATEMENT OF THE CASE 1

I. The Facts 1

II. The Proceedings Below 4

REASONS FOR DENYING THE PETITION 6

I. There Is No Conflict Among the Courts of Appeals on the Question Actually Presented Here, Because the Sixth Circuit Is the Only Circuit That Has Addressed the Scope of Judicial Review of an Agency Fee That Has Previously Been Reviewed by a *Hudson* Decisionmaker 6

A. In Cases Brought Under § 1983, the Circuits Have Uniformly Held That Exhaustion Is Not Required 7

B. The Exhaustion Issue Is Not Necessarily Linked to the Discovery Issue Raised Here for the First Time 9

II. The Court of Appeals' Decision Is Wholly Consistent with this Court's Decisions in *Abood* and *Hudson* 12

TABLE OF CONTENTS - CONTINUED

Page

III. The "Practical Consequences" of the Sixth Circuit's Decision That the Unions Hypothesize Are Irrelevant and Chimerical 18

CONCLUSION 21

APPENDIX

United States Constitution, Article III 1a

Civil Rights Act of 1871, 42 U.S.C. § 1983 (1988) ... 1a

TABLE OF AUTHORITIES

Page

CASES

Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977) 12-13

Abrams v. Communications Workers, 59 F.3d 1373 (D.C. Cir. 1995) 9

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) ..... *passim*

Associated Plumbing & Mech. Contractors v. Plumbers Local 447, 811 F.2d 480 (9th Cir. 1987) 15

Bell v. Burson, 402 U.S. 535 (1971) 19

Bethlehem Mines Corp. v. Mine Workers, 344 F. Supp. 1161 (W.D. Pa. 1972), *aff'd*, 494 F.2d 726 (3rd Cir. 1974) 15

Brosterhous v. State Bar, 906 P.2d 1242 (Cal. 1995) 8, 10, 18

Chandler v. Roudebush, 425 U.S. 840 (1976) 17

Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) 19

Eastland v. TVA, 553 F.2d 364 (5th Cir. 1977) 17

Felder v. Casey, 487 U.S. 131 (1988) 8-9

Food & Commercial Workers Local 951 v. Mulder, 31 F.3d 365 (6th Cir. 1994), *cert. denied*, 115 S. Ct. 1095 (1995) 9

TABLE OF AUTHORITIES - CONTINUED

Page

Gibney v. Toledo Bd. of Educ., 532 N.E.2d 1300 (Ohio 1988) 8

Hohe v. Casey, 956 F.2d 399 (3d Cir. 1992) ..... *passim*

Hudson v. Teachers Local 1, 922 F.2d 1306 (7th Cir.), *cert. denied*, 501 U.S. 1230 (1991) ..... *passim*

Lancaster v. Air Line Pilots Ass'n, 76 F.3d 1509 (10th Cir. 1996) 7, 9, 11-12

Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507 (1991) 15

Lehnert v. Ferris Faculty Ass'n, 556 F. Supp. 316 (1983), *judgment entered*, 643 F. Supp. 1306 (W.D. Mich. 1986), *aff'd*, 881 F.2d 1388 (6th Cir. 1989), *aff'd in part, rev'd in part*, 500 U.S. 507 (1991) 13

Litton Fin. Printing Div. v. NLRB, 501 U.S. 190 (1991) 15

McDonald v. City of West Branch, 466 U.S. 284 (1984) ..... *passim*

Patsy v. Board of Regents, 457 U.S. 496 (1982) 8-9

Teachers Local 1 v. Hudson, 475 U.S. 292 (1986) ... *passim*

Tierney v. City of Toledo, 917 F.2d 927 (6th Cir. 1990) 8-9

TABLE OF AUTHORITIES - CONTINUED

Page

CONSTITUTIONAL, STATUTORY, AND RULES PROVISIONS

U.S. Const. art. III 1, 10, 19-20

U.S. Const. amend. I ..... *passim*

U.S. Const. amend. XIV 4

Civil Rights Act of 1871, 42 U.S.C. § 1983 (1988) ... *passim*

Civil Rights Act of 1964, Title VII, 42 U.S.C. §§ 2000e *et seq.* (1988) 14, 17, 19

National Labor Relations Act, 29 U.S.C. §§ 151-69 (1988) 9

Railway Labor Act, § 2, Eleventh, 45 U.S.C. § 152, Eleventh (1988) 9

Federal Rule of Civil Procedure 56(f) 4

OTHER AUTHORITIES

Monaghan, Henry P., *First Amendment "Due Process,"* 83 Harv. L. Rev. 518 (1970) 15-16

IN THE
Supreme Court of the United States
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v.

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the First Amendment to the United States Constitution, set out in pertinent part in the Petition at 2, this case involves Article III of the Constitution and the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1988). We reproduce the pertinent parts of Article III and § 1983 in the Appendix to this brief.

COUNTERSTATEMENT OF THE CASE

I. The Facts.

Petitioner Michigan Education Association ("MEA") and its national affiliate, Petitioner National Education Association ("NEA"), represent public school and college employees in

Michigan in collective bargaining through local affiliates.[1] Pursuant to state law, the MEA and its subordinate locals have agreements with many employers that require as a condition of employment that employees who do not join the union pay an "agency shop" service fee in an amount not to exceed a member's dues. The MEA, NEA, and seven Petitioner locals (collectively, "the unions") each receive part of the fees. (Pet. App. at 3a-4a.)

The MEA has established procedures regarding the collection of service fees that apply to all of the unions. Applying those procedures, the MEA mailed all nonmembers subject to "agency shop" agreements a packet of materials demanding payment of fees for school year 1991-1992. This packet included summary information about the fees' bases and the MEA's procedure for challenging them. (*Id.* at 4a.).[2]

Plaintiffs are eighteen nonmembers subject to "agency shop" agreements negotiated by the unions in several different bargaining units. They and 218 others notified the unions, by checking the appropriate boxes on an objection form in the MEA's packet, that they wished to challenge the 1991-92 service fees under the MEA's procedure. (*Id.* at 3a-4a.) Several nonmembers expressly stated on the objection form that by participating in the MEA's procedure they did "'not . . . waive [their] rights to challenge the

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[1] There is no record evidence for Petitioners' claim that "each of the plaintiffs . . . received the benefits of collective bargaining," (Pet. at 3). Whether Respondents received any such "benefits" also is irrelevant.

[2] The record contains insufficient admissible evidence to support the unions' self-serving description of their "elaborate accounting and record-keeping system" for calculation of the fees or their claim that those calculations "are audited . . . in accordance with standard auditing procedures," (Pet. at 3-4.) The adequacy of the unions' cost accounting and audits are issues which the nonmembers could not contest on summary judgment without the discovery of the unions' underlying records that the district court denied. (*See* Pet. App. at 6a-8a, 12a-13a, 19a.)

amount of the fee in forums in addition to that provided under those procedures.'" (*Id.* at 4a-5a.)

Under the MEA's procedure, the American Arbitration Association ("AAA") conducted the challenge proceedings pursuant to its "Rules for Impartial Determination of Union Fees." Under those rules, the AAA appoints an "arbitrator"[3] who "is to be 'experienced in employment relations.'" The "rules contain no provision for peremptory challenges" to the appointment. Challengers have no right to pre-hearing discovery or to compel the testimony of union witnesses or production of union documents at the hearing. They can only ask the "arbitrator" at the hearing to exercise his discretion to require the unions to "'produce such additional evidence as the arbitrator may deem necessary.'" The "arbitrator" is to issue "a prompt decision 'in accordance with applicable law and the union's internal procedures.'" (*Id.* at 5a.)

The "arbitrator" appointed here, Barry C. Brown, was "not . . . shown to possess any special competence in First Amendment law." (*Id.* at 5a, 13a.) He conducted three days of hearings at which only three nonmembers appeared, one of whom is a named Plaintiff. No attorney appeared for the nonmembers. All witnesses who testified were the unions' agents. (*Id.* at 5a-6a.) "The case presented . . . rested primarily on hearsay—upon summaries of documents that were not presented in evidence and had not been made available for inspection by dissenters prior to the arbitration hearing." No nonmembers asked Brown to require the unions to submit additional witnesses or documents. (*Id.* at 6a, 12a.) Brown ruled that the fees were lawful in all respects. (*Id.* at 7a.)

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[3] We put the terms "arbitrator" and "arbitration" in quotes when referring to the MEA's procedure, because it is not arbitration as that term is defined in law. *See infra* p. 15.

II. The Proceedings Below.

This is an action for declaratory, monetary, and injunctive relief under 42 U.S.C. § 1983. The class action complaint alleges that the unions exacted fees from objecting nonmembers that included the costs of activities that may not constitutionally be charged to them under the First and Fourteenth Amendments to the United States Constitution, either because the unions misclassified expenses or failed to maintain records sufficient to meet their burden of proving chargeable costs. (Pet. App. at 2a-3a, 22a.)

The nonmembers served timely interrogatories and requests for production of documents. (*Id.* at 2a.) The interrogatories asked for the identity of the persons who participated in the calculations, and in the unions' auditors' examinations, of the schedules of chargeable and nonchargeable expenses on which the service fees were based; and for the amounts that the unions spent on each category of chargeable or nonchargeable activity used in its calculations. The requests for production asked the unions to produce the record of the AAA's proceeding; other documents underlying, used in, created during, or otherwise related to the unions' calculations, and their auditors' examinations, of the schedules of chargeable and nonchargeable expenditures; and the objection forms submitted by nonmembers who challenged the fees under the MEA's procedure. (*Id.* at 7a.)

The unions produced the "arbitration" record and the objection forms. However, they refused otherwise to answer the nonmembers' discovery requests and sought a protective order against all other discovery. The unions also moved for summary judgment, contending that the AAA record shows that the fees comply with all constitutional limitations. (*Id.* at 2a-3a, 7a.)

In a series of orders, the district court refused to permit additional discovery. The nonmembers moved under Federal Rule of Civil Procedure 56(f) to stay the Motion for Summary Judgment. They explained, with supporting declarations, "that

determination of the constitutionality of the unions' classification of expenses as chargeable to objecting nonmembers required 'specific identification of the activities involved;' and that discovery of these facts—facts solely within the possession of the unions—was essential for opposition to the summary judgment motion." However, the court denied a stay. (Pet. App. at 7a-8a.)

The court recognized that, "[b]ut for the arbitration proceedings and award, extensive discovery would be fully justified." (*Id.* at 25a-26a.) Nonetheless, it held that it should decide the Motion for Summary Judgment solely on the "arbitration" record, because the nonmembers initiated those proceedings, but failed to ask the "arbitrator" to require the unions to submit evidence beyond that which the unions chose to introduce. The court gave "great deference" to "arbitrator" Brown's factual findings and "approval of accounting procedures." (*Id.* at 28a-32a.)

The court also held that certain categories of activities the nonmembers challenged in opposing summary judgment are constitutionally chargeable and that, given the deference accorded Brown's award, there were no genuine issues of material fact for trial. (*Id.* at 32a-38a.) The court, therefore, confirmed its denial of further discovery, granted the unions summary judgment, and dismissed the nonmembers' Motion for Class Certification as moot. (*Id.* at 30a, 39a.)

The nonmembers timely appealed to the United States Court of Appeals for the Sixth Circuit from the district court's final judgment. (*Id.* at 8a.) The Court of Appeals ruled that the "right to have an Article III court adjudicate suits brought pursuant to § 1983 for vindication of rights secured by the First Amendment . . . cannot be foreclosed by non-statutory arbitration conducted by a privately appointed decisionmaker." (*Id.* at 10a-11a.) The court explained that "rules of evidence that treat hearsay with skepticism, and discovery procedures that allow litigants to probe their adversaries' cases in depth prior to hearing," are "safeguard[s] which . . . help[] 'insure that the government treads with sensitivity in areas freighted with First

Amendment concerns.'" (*Id.* at 12a, 14a (quoting *Teachers Local 1 v. Hudson*, 475 U.S. 292, 303 n.12 (1986).)

The Court of Appeals, therefore, concluded that "in accepting the arbitrator's endorsement of the unions' cost allocations without allowing discovery of the materials on which the calculations were based," "the district court clearly abused its discretion." (*Id.* at 12a, 18a.) The court vacated the summary judgment and remanded for further proceedings consistent with its opinion, including "a reasonable opportunity" for the nonmembers to conduct "meaningful discovery." (*Id.* at 18a-20a.)[4] The unions' Petition for Rehearing En Banc was denied with "no judge of th[e] court having requested a vote." (*Id.* at 67a.)

REASONS FOR DENYING THE PETITION

I. There Is No Conflict Among the Courts of Appeals on the Question Actually Presented Here, Because the Sixth Circuit Is the Only Circuit That Has Addressed the Scope of Judicial Review of an Agency Fee That Has Previously Been Reviewed by a *Hudson* Decisionmaker.

The Petition at 10 broadly describes the "question presented here" as that of "the role of the federal courts in adjudicating service fee claims after a *Hudson* arbitration" has occurred. The unions cite no other decision of a United States Court of Appeals that has decided this general question, or the precise discovery

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[4] The Court of Appeals also reversed the district court's holding that "defensive organizing costs" are chargeable; ruled "that there is a genuine issue of material fact, at least, as to whether certain categories of administrative costs that were treated as chargeable in their entirety should instead have been allocated proportionally between chargeable and non-chargeable activities"; and directed the district court to "revisit the class certification issue." (Pet. App. at 18a-20a.) The unions apparently do not seek review of these rulings. (*See* App. at 9 n.4.)

question presented here, contrary to the Sixth Circuit's decision in this case.

Instead, the unions cite a purported conflict among the Courts of Appeals on another question, not presented here,—"the exhaustion issue"—that they claim is "plainly linked" to the question presented here. (Pet. at 10.) The split in the Circuits on the exhaustion issue, if it exists at all, is not as clear or as even as the unions describe it. Nor is that issue necessarily linked to the question presented here of the scope of judicial proceedings under § 1983 after a *Hudson* decisionmaker has reviewed an agency fee.

A. In Cases Brought Under § 1983, the Circuits Have Uniformly Held That Exhaustion Is Not Required.

The unions cite *Hudson v. Teachers Local 1*, 922 F.2d 1306 (7th Cir.), *cert. denied*, 501 U.S. 1230 (1991) ("*Hudson II*"), and *Lancaster v. Air Line Pilots Ass'n*, 76 F.3d 1509 (10th Cir. 1996), as holding that "objecting fee payers are required to exhaust a proper *Hudson* procedure, where it exists, before challenging a service fee in federal court." (Pet. at 12-13.) However, as the Court of Appeals concluded here, "the Seventh Circuit panel [in *Hudson II*] did not hold that exhaustion of the arbitral remedy could be required as a condition to the bringing of a § 1983 action." (Pet. App. at 15a). Moreover, *Lancaster* is distinguishable, because it was not brought under § 1983.

The Sixth Circuit noted here that certain passages in *Hudson II*, "[t]aken out of context, . . . sound[] like a powerful argument in favor of an exhaustion requirement." However, the "exhaustion issue was not before the [*Hudson II*] panel at all," because the "question being addressed . . . was whether the notice containing the union's explanation of the basis on which the amount of the agency fee had been determined was adequate to pass constitutional muster." In the passages that, out of context, seem to support an exhaustion requirement, the Seventh Circuit was merely responding to the plaintiffs' argument "that the correct-

ness of the amount had to be adjudicated in court *before the fee could be collected and escrowed in the first instance*." (Pet. App. at 15a.) *See Hudson II*, 922 F.2d at 1314.

The Sixth Circuit could have added that, had *Hudson II* held that exhaustion is required in these cases, it would have been wrong. This Court has held "categorically that exhaustion is not a prerequisite to an action under § 1983." *Patsy v. Board of Regents*, 457 U.S. 496, 500-01 (1982); *see Felder v. Casey*, 487 U.S. 131, 146-50 (1988).

Consequently, the Third and Sixth Circuits, and the Ohio Supreme Court, have ruled that nonmembers may not be required to arbitrate their challenges to agency fees before suing under § 1983. *Hohe v. Casey*, 956 F.2d 399, 408-09 (3d Cir. 1992); *Tierney v. City of Toledo*, 917 F.2d 927, 939-40 (6th Cir. 1990); *Gibney v. Toledo Bd. of Educ.*, 532 N.E.2d 1300, 1303-05 (Ohio 1988). *Cf. Brosterhous v. State Bar*, 906 P.2d 1242, 1255-58 (Cal. 1995) (holding the same concerning compulsory bar members challenging the amount of their dues in a § 1983 case).

Hohe did not, as the Petition at 14 contends, "stake[] out an intermediate position on the exhaustion question." The Third Circuit merely pointed out that the Pennsylvania statute at issue there distinguished between "challenges to the chargeability of an activity" and "challenges to the amount of a chargeable fee." The court then held that the exhaustion requirement was "invalid **in its entirety**." *See Hohe*, 956 F.2d at 408-09 & n.4 (emphasis added).

The *Hohe* court did not rule that exhaustion could be required for challenges to the amount of a chargeable fee, as the unions argue. To the contrary, the Third Circuit ruled that the district court erred in leaving to arbitration in the first instance the nonmembers' challenges to the union's "classification of expenses as chargeable" and "to the amount of the chargeable fee." The court remanded *Hohe* for the district court to decide those issues.

See id. at 416, *rev'g in pertinent part*, 135 L.R.R.M. (BNA) 3026, 3028 (M.D. Pa. 1990).

In *Lancaster*, the Tenth Circuit interpreted *Hudson II* as requiring exhaustion and declined to follow *Tierney*. *See* 76 F.3d at 1521-22. However, that is mere dicta as to § 1983, because *Lancaster* was brought under § 2, Eleventh of the Railway Labor Act, 45 U.S.C. § 152, Eleventh (1988), not § 1983. 76 F.3d at 1513. Thus, *Lancaster* did not have to address the binding contrary authority of *Patsy* and *Felder*, and does not establish a split in the circuits on the exhaustion issue under § 1983.[5]

B. The Exhaustion Issue Is Not Necessarily Linked to the Discovery Issue Raised Here for the First Time.

This case does not present the exhaustion issue. The unions did not move for judgment on the ground that the nonmembers failed to exhaust the MEA's "arbitration" procedure. In granting the unions summary judgment, the district court expressly stated that the "'exhaustion' issue . . . is **not** within the scope of this opinion." (Pet. App. at 28a n.6 (emphasis added).) Admittedly, the Court of Appeals discussed it in response to the unions' argument that "*Hudson* arbitration would . . . become a waste of time and money unless its availability were held to foreclose normal pre-trial discovery." However, the court did not hold that exhaustion is not required, but simply recognized that it had already so held in *Tierney*. (*See id.* at 14a-16a.)

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[5] *Lancaster* is the only appellate decision under any statute holding that exhaustion of a union's *Hudson* challenge procedure is a prerequisite to a federal court action. The District of Columbia and Sixth Circuits have held that exhaustion cannot be required in an agency fee case brought under the National Labor Relations Act, 29 U.S.C. §§ 151-69 (1988). *Abrams v. Communications Workers*, 59 F.3d 1373, 1382 (D.C. Cir. 1995); *Food & Commercial Workers Local 951 v. Mulder*, 31 F.3d 365, 367-68 (6th Cir. 1994), *cert. denied*, 115 S. Ct. 1095 (1995).

The Court of Appeals' dicta concerning the exhaustion issue was not, as the Petition at 13 asserts, "a predicate for the decision below." The decision below was predicated on:

- the "right to have an Article III court adjudicate suits brought pursuant to § 1983 for vindication of rights secured by the First Amendment," (Pet. App. at 10a-11a);

- *Hudson*'s "recogni[tion] that '[t]he arbitrator's decision would *not* receive preclusive effect in any subsequent § 1983 action,'" and *Hudson*'s citation of *McDonald v. City of West Branch*, 466 U.S. 284 (1984), for that proposition, (Pet. App. at 11a (quoting *Hudson*, 475 U.S. at 308 n.21));

- this Court's holdings in *McDonald*, a case the Petition ignores completely, concerning the weight to be given an arbitral decision in the adjudication of § 1983 claims, (*id.* at 11a-13a);

- the particular "facts and circumstances" showing the inadequacy of the "arbitration" and the need for discovery here, (*id.*);

- *Hudson*'s holding that "procedural safeguards" are necessary in this context to "'insure that the government treads with sensitivity in areas freighted with First Amendment concerns,'" (*id.* at 12a-14a (quoting *Hudson*, 475 U.S. at 303 n.12)); and,

- the conclusion, shared by the Third Circuit and California Supreme Court, that "*Hudson* arbitration" is not "a waste of time and money," although it does not "foreclose normal pre-trial discovery," because, if "*Hudson* arbitrators do their job properly, . . . the probability is that some of these controversies will not reach the courts at all," (*id.* at 14a (citing *Hohe*, 956 F.2d at 409; *Brosterhous*, 906 P.2d at 1253)).

Thus, because the Court of Appeals' decision here was not predicated on the exhaustion issue, it does not directly conflict

even with what the unions incorrectly perceive to be the decisions of the Seventh and Tenth Circuits in *Hudson II* and *Lancaster* on that issue. Nor do the views of the Seventh and Tenth Circuits concerning "the exhaustion issues reflect[] a larger disagreement among the circuits . . . which goes to the very heart of the issues in the instant lawsuit," as the Petition at 13 asserts.

The heart of the issue here is whether a union can preclude discovery and judicial review of the facts underlying its calculation of an agency fee charged to objecting nonmembers by establishing a "non-statutory arbitration conducted by a privately appointed decisionmaker," (Pet. App. at 11a). Obviously, the answer to that question is "no" if exhaustion is not required. In that event, nonmembers can resort directly to court under § 1983 and obtain normal discovery and full judicial review of their claims. It logically follows that the same judicial processes must be available to nonmembers who first make a good faith, although unsuccessful, attempt to resolve their claims in a nonjudicial forum they have no legal obligation to use.

However, it does **not** necessarily follow that nonmembers can be denied normal discovery and full judicial review if exhaustion is a prerequisite to filing a lawsuit challenging agency fees. Neither *Hudson II* nor *Lancaster* states or implies such a limitation on judicial review in these cases.

Hudson II merely held that "*Hudson* did not contemplate that federal courts would be required, on the basis of the notice, to pass on the legality and accuracy of every element of the fee calculation before any fees could be collected." It also recognized that "the impartial decisionmaker's determination is not the final word on the challenge. *If* the decision is adverse to the plaintiffs, they may *subsequently* seek review by a federal court." 922 F.2d at 1314. *Hudson II* says nothing about the scope of discovery and judicial review in such a subsequent action.

Lancaster, however, does imply that normal discovery and judicial review are to be afforded nonmembers who exhaust union

agency-fee remedies. *Lancaster*, in a passage the Petition at 14 quotes incompletely and out of context, states: "[w]ere we to hold there is no exhaustion requirement," "**we would more often** be forced to micromanage the fee calculation in every case challenging a union assessment. . . ." 76 F.3d at 1522 (emphasis added) (emphasized words omitted in Petition at 14).

In sum, no conflict, either direct or in principle, among the Courts of Appeals justifies granting the unions' petition. This is the first case in which a Court of Appeals has addressed the scope of discovery in a § 1983 action challenging the constitutionality of a union's agency fee after it has been reviewed in a "non-statutory arbitration conducted by a privately appointed decision-maker," (Pet. App. at 11a).

II. The Court of Appeals' Decision Is Wholly Consistent with this Court's Decisions in *Abood* and *Hudson*.

The unions argue that the Court of Appeals' decision "breaks faith with the rationale of *Abood [v. Detroit Board of Education*, 431 U.S. 209 (1977),] and *Hudson*." They assert that the "lesson" of those cases is that "so long as a union draws the constitutionally correct line between chargeable and nonchargeable expenditures, and applies that line through constitutionally required procedures, the First Amendment right 'to withhold support of ideological causes' is fully protected." (Pet. at 15-16 (quoting *Abood*, 431 U.S. at 241).) The unions do not explain how the First-Amendment right is fully protected if there is no judicial review in a truly adversary proceeding, where both sides have access to the underlying facts, about whether the union **in fact** has correctly **applied** the constitutionally correct line.

Abood does not directly address the scope of judicial review of a union's agency fee where the union has established a nonjudicial review procedure to comply with *Hudson*. It hardly could, because this Court did not specify that unions must "provide for a reasonably prompt decision by an impartial decisionmaker" until *Hudson*, 475 U.S. at 307. However, the

Court of Appeals' decision that the nonmembers are entitled to "discovery of the materials on which the calculations [of the fee] were based," (Pet. App. at 12a), is wholly consistent with *Abood*.

Abood recognized that drawing the line between constitutionally chargeable and nonchargeable activities involves "difficult" mixed questions of fact and law that cannot be determined without "factual concreteness and adversary presentation," requiring an "evidentiary record" that provides "specificity in the description of [the union's] activities." *See* 431 U.S. at 236 & n.33. *Abood* also acknowledged that only the unions possess the facts and records from which the proportion of chargeable to total union expenditures can be calculated. *Id.* at 239 n.40.

It necessarily follows from *Abood* that there is no truly adversary presentation on an adequate evidentiary record without "discovery procedures that allow [the nonmembers] to probe their adversaries' cases in depth prior to hearing," as the Court of Appeals held. (Pet. App. at 12a.) *See Lehnert v. Ferris Faculty Ass'n*, 556 F. Supp. 316, 318-20 (1983) (protective order denied), *judgment entered*, 643 F. Supp. 1306 (W.D. Mich. 1986), *aff'd*, 881 F.2d 1388 (6th Cir. 1989), *aff'd in part, rev'd in part on other grounds*, 500 U.S. 507 (1991). Nonmembers cannot possibly rebut or impeach the unions' witnesses and summary exhibits without prior access to the underlying records.

The Court of Appeals' decision also is wholly consistent with *Hudson*. *Hudson* held that the "nonunion employee, whose First Amendment rights are affected by the agency shop itself and who bears the burden of objecting, is entitled to have his objections addressed in an expeditious, **fair**, and objective manner." 475 U.S. at 307 (emphasis added). A proceeding in which only one side to the dispute has access to the facts and determines what evidence will be introduced, and in which the decision is based on self-interested hearsay, is hardly fair.

Moreover, *Hudson* "presume[d] that the courts remain available as the ultimate protectors of constitutional rights" even

where a union adopts a procedure for challenges to agency fees. *Id.* at 308 n.20. *Hudson* also explicitly held that, if the procedure adopted was arbitration, the "arbitrator's decision would not receive preclusive effect in any subsequent § 1983 action." *Id.* at 308 n.21. The unions erroneously assert that the Court stated this holding "without further explication." (Pet. at 12 n.6.) *Hudson* provided all the explication that is necessary by citing *McDonald v. City of West Branch* for this rule. *See* 475 U.S. at 308 n.21.

The Court of Appeals' decision faithfully applies the no-preclusion rule of *Hudson* and *McDonald*. *McDonald* and *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), which *McDonald* followed, establish that deferring to an arbitrator's decision gives it preclusive effect, contrary to *Hudson*.

McDonald held "that in a § 1983 action, a federal court should not afford res judicata or collateral-estoppel effect to an award in an arbitration proceeding." 466 U.S. at 292. *McDonald* characterized application of those doctrines as "giv[ing] preclusive effect to the arbitration award." *Id.* at 287. Moreover, *McDonald* described "a rule that would have required federal courts to **defer** to an arbitrator's decision," rejected under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, in *Gardner-Denver*, as a rule that would "**preclude** a subsequent suit in federal court." 466 U.S. at 288-89 (emphasis added); *see Gardner-Denver*, 415 U.S. at 55-60.

Hudson's ban on preclusion, or deference, is not limited to issues of law, as the unions would have it, (*see* Pet. at 14-16.) It includes factual issues. *McDonald* held "that in a § 1983 action, a federal court should not afford . . . collateral-estoppel effect to an award in an arbitration proceeding." *Id.* at 292. Collateral estoppel applies to issues of **both** fact and law. *See id.* at 287 n.5.

McDonald also held that "an arbitration proceeding cannot provide an adequate substitute for a judicial **trial**," and that it "'is the duty of courts to assure the **full** availability of th[e judicial] forum,'" *id.* at 292 & n.13 (quoting *Gardner-Denver*, 415 U.S.

at 60 n.21) (emphasis added). Trial would be unnecessary, and the judicial forum would not be **fully** available, if the court's only duty was to decide issues of law. *Gardner-Denver* held, without qualification, that the "federal court should consider the employee's claim *de novo*." 415 U.S. at 60.

The Petition at 16 n.8 relies on the comment in Henry P. Monaghan, *First Amendment "Due Process,"* 83 Harv. L. Rev. 518, 526 (1970) (footnote omitted), that "[s]o far as the first amendment is concerned, the task of historical factfinding may be left to administrative agencies, at least if . . . the agencies' procedures appear reasonably capable of ensuring reliable hearings." That comment is inapplicable here for several reasons.

To begin with, a decisionmaker appointed by the AAA is not an administrative agency. Indeed, "arbitration" under the MEA's procedure and the AAA's rules is not arbitration. The decisionmaker is chosen by a private organization unilaterally designated by the MEA, not by mutual agreement of the nonmembers and the unions.

"By definition, an arbitrator must be a person chosen by mutual agreement." An "essential element of arbitration" is "that the selection of the particular arbitrator or the method of selection of an arbitrator be established by **mutual agreement** between the parties." *Bethlehem Mines Corp. v. Mine Workers*, 344 F. Supp. 1161, 1165 (W.D. Pa. 1972) (emphasis added), *aff'd*, 494 F.2d 726 (3d Cir. 1974); *see Associated Plumbing & Mech. Contractors v. Plumbers Local 447*, 811 F.2d 480, 483-84 (9th Cir. 1987); *cf. Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 201 (1991) ("arbitration is a matter of consent, . . . and will not be imposed on parties beyond the scope of their agreement").

Second, mere "historical factfinding" is not involved here. This case involves difficult questions of mixed fact and constitutional law about whether union expenses are "'germane' to collective bargaining activity," "justified by the government's vital policy interest in labor peace and avoiding 'free riders'," and,

most important, do "not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 519 (1991). As Monaghan said about a labor board, a labor arbitrator, "when dealing with questions of speech, is more likely to see the problem in terms of labor-management relations than in terms of first amendment interests." Monaghan, *supra* at 523.

Third, this is an action under § 1983. *McDonald* held that, "in a § 1983 action, an arbitration proceeding cannot provide an adequate substitute for a judicial trial." Therefore, in such an action, "a federal court should not afford [any] res judicata or collateral-estoppel effect to an award in an arbitration proceeding. . . ." 466 U.S. at 292.

Under *McDonald*, the "arbitral decision may [only] be admitted as evidence in a § 1983 action." The weight to be accorded that decision "'must be determined in the court's discretion with regard to the facts and circumstances of each case,'" including "'the degree of procedural fairness in the arbitral forum, adequacy of the record with respect to the issue [in the judicial proceeding], and the special competence of particular arbitrators.'" 466 U.S. at 292 & n.13 (quoting *Gardner-Denver*, 415 U.S. at 60 n.21).

The Sixth Circuit faithfully applied these factors in deciding that the district court erred in denying the nonmembers discovery outside the "arbitration" record and giving great deference to "arbitrator" Brown's factual findings and approval of the unions' accounting practices. The court determined that the MEA's procedure could not reasonably ensure reliable findings that "could appropriately be used as the basis of a definitive determination of the objectors' First Amendment claims," because the "case presented to the arbitrator rested primarily on hearsay," the nonmembers were denied any "meaningful pre-trial discovery," and the "arbitrator . . . has not been shown to possess any special competence in First Amendment law." (Pet. App. at 11a-13a.)

McDonald and *Gardner-Denver* held that § 1983 and Title VII, respectively, "permit an employee to have his claim considered in both the arbitral and judicial forums." *Gardner-Denver*, 415 U.S. at 54; *see McDonald*, 466 U.S. at 292. In filing an action under § 1983 or Title VII, "the employee is **not** seeking review of the arbitrator's decision," but "is asserting a statutory right **independent of the arbitration**." *Gardner-Denver*, 415 U.S. at 54 (emphasis added); *see McDonald*, 466 U.S. at 290.

It necessarily follows that, as in any independent cause of action, the nonmembers are entitled to pre-trial discovery that might enable them to oppose summary judgment with conflicting evidence that was not part of the arbitral record. That is clear from *Chandler v. Roudebush*, in which this Court reversed decisions denying a Title VII plaintiff discovery and granting summary judgment against her based solely on an administrative record. *See* 425 U.S. 840, 841-43, 864 (1976); *Eastland v. TVA*, 553 F.2d 364, 370 (5th Cir. 1977).

The unions argue, however, that allowing the nonmembers discovery of facts outside the "arbitration" record to enable them to oppose summary judgment "would defeat the purpose of *Hudson*," because the purpose of *Hudson*'s "arbitration" requirement "is to enable potential objectors to 'identify the impact of the governmental action on [their] interests.'" (Pet. at 16 (quoting *Hudson*, 475 U.S. at 303).) The unions confuse the purpose of *Hudson*'s notice requirement with that of *Hudson*'s "impartial decisionmaker" requirement.

The purpose of *Hudson*'s "impartial decisionmaker" requirement is not to enable "potential objectors" to "identify the impact of the governmental action on [their] interests." That is the purpose of *Hudson*'s notice requirement. *Compare* 475 U.S. at 303 *with id.* at 306. The purpose of *Hudson*'s "impartial decisionmaker" requirement is to give nonmembers who have objected "a fair opportunity . . . to assert a meritorious First Amendment claim" and have it "addressed in an expeditious, fair, and objective manner." *Compare id.* at 303 *with id.* at 307.

The Court of Appeals' decision is entirely consistent with the latter purpose. It concluded that the "arbitration" here denied the nonmembers a fair opportunity to assert their First-Amendment claims, because it lacked "rules of evidence that treat hearsay with skepticism, and discovery procedures that allow litigants to probe their adversaries' cases in depth prior hearing." (*See* Pet. App. at 12a-14a.)

Moreover, the purpose of *Hudson*'s "impartial decisionmaker" requirement was only to give nonmembers an **"opportunity"** to have their objections "addressed in an expeditious, fair, and objective manner." 475 U.S. at 303, 307 (emphasis added). First-Amendment due process requires that unions provide such an "opportunity" as a prerequisite to the "collection of agency fees." *See id.* at 307 n.20, 310.

However, it was not *Hudson*'s purpose to limit "ordinary judicial remedies," which *Hudson* presumed always "remain available." *See id.* at 307-08 nn.20-21. *Hudson* suggested arbitration "only as an expeditious means of resolving narrow questions of deductibility and avoiding infringement of First Amendment rights pending that resolution, not as a substitute for . . . a section 1983 action." *Brosterhous*, 906 P.2d at 1251; *see Hohe*, 956 F.2d at 409.

In short, the Court should deny the petition, because in *Hudson* and *McDonald* it effectively settled the question presented here in a way that compels the Court of Appeals' decision.

III. The "Practical Consequences" of the Sixth Circuit's Decision That the Unions Hypothesize Are Irrelevant and Chimerical.

The unions speculate that the "decision below opens the door to a new generation of [costly and complex] litigation" that "'would place an overwhelming and unrealistic burden on the courts.'" (Pet. at 18 (quoting *Hudson II*, 922 F.2d at 1314).) This hysterical speculation is both irrelevant and unwarranted.

First-Amendment due process requires unions to prove that the fees they charge objecting nonmembers include only constitutionally chargeable costs. *See Hudson*, 475 U.S. at 306. In enacting § 1983, Congress gave nonmembers a statutory right to require unions to meet that burden of proof in an Article III court. *See McDonald*, 466 U.S. at 290; Pet. App. at 10a. Any administrative inconvenience or expense involved in affording nonmembers that right is insufficient to justify denying or limiting it. *See Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 647 (1974); *Bell v. Burson*, 402 U.S. 535, 540-41 (1971).

Similar burdensomeness arguments could be made concerning many classes of cases that the federal courts handle. Should this Court have upheld school segregation in 1954, because declaring it unconstitutional would have clogged the federal courts with many complex, protracted, and costly cases overseeing the desegregation of the many school districts that were segregated then? The question answers itself.

Similar arguments that deferral to arbitration would "sav[e] . . . judicial time and expense" were made by the lower courts and defendants in *Gardner-Denver* and rejected by this Court. *See* 415 U.S. at 54, 59. Indeed, in *Gardner-Denver* and *McDonald* the Court concluded that allowing employees to litigate cases *de novo* under Title VII and § 1983 after arbitration probably would **reduce** the number of cases that the courts would face, for two reasons.

First, even though the judicial forum is potentially available, arbitration is "a relatively inexpensive and expeditious means for resolving . . . disputes" that "may well produce a settlement satisfactory to both" sides. Arbitration "may often eliminate those misunderstandings or discriminatory practices that might otherwise precipitate resort to the judicial forum." *Gardner-Denver*, 415 U.S. at 55. The Court of Appeals reached the same conclusion here: "If *Hudson* arbitrators do their job properly, . . . the probability is that some of these controversies will not reach the courts at all." (Pet. App. at 14a.)

Second, the judicial forum should be fully available even after arbitration, because a

> deferral rule also might adversely affect the arbitration system . . . . Fearing that the arbitral forum cannot adequately protect their rights under [the civil rights statute], some employees may elect to bypass arbitration and institute a lawsuit. The possibility of voluntary compliance or settlement of . . . claims would thus be reduced, and the result could well be more litigation, not less.

Gardner-Denver, 415 U.S. at 59; *accord McDonald*, 466 U.S. at 292 n.11.

The unions' Petition itself shows the chimerical nature of their professed fears that a flood of costly and complex litigation will result from the Court of Appeals' decision. The unions identify no case, other than this, filed in the ten years since this Court decided *Hudson*, in which nonmembers have challenged a union's computation of the amount of an agency fee. (*See* Pet. at 17-18.)[6]

What the unions really fear, we submit, is not a flood of litigation. They fear full disclosure to their litigation opponents of the nature of their expenditures and review of their computations, under the rules of evidence, by an Article III judge qualified to determine the extent to which the state can compel speech and association. In short, the unions would like to hide in the dark, with only review on a union-selected, summary record by a person who normally resolves contract disputes and has no demonstrated expertise in First-Amendment law.

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[6] To be candid, as we point out *supra* pp. 8-9, the nonmembers did challenge the amount of the fee in *Hohe*. *See* 956 F.2d at 416. However, *Hohe* was primarily a challenge to the adequacy of the union's *Hudson* procedures. *See id.* at 402-12, 415.

CONCLUSION

No conflict among the Courts of Appeals exists concerning the discovery issue this case presents. Moreover, the Court of Appeals' decision is consistent with the relevant decisions of this Court. The petition should be denied. If a writ of certiorari is granted, the Court of Appeals' decision should be summarily affirmed.

Respectfully submitted,

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APPENDIX

United States Constitution, Article III

Section 1. The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . .

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution [and] the Laws of the United States . . . .

Civil Rights Act of 1871, 42 U.S.C. § 1983 (1988)

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.